Supreme Court, U.S.
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No. (1)

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In The Supreme Court of the United States

POTOMAC ELECTRIC POWER COMPANY, *et al.*,

Petitioners,

v.

BRIAN A. MASTRO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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QUESTION PRESENTED

May a court properly consider an expired consent decree as evidence of discrimination or discriminatory intent in a reverse discrimination case?

PARTIES TO PROCEEDING

Petitioners:
Potomac Electric Power Company
Sunil V. Pancholi
David A. Duarte

Respondent:
Brian A. Mastro

CORPORATE DISCLOSURE STATEMENT

Petitioner Potomac Electric Power Company ("Pepco"), by counsel, herby submits the following corporate disclosure statement in accordance with Rule 29.6.

Pepco is a District of Columbia and Virginia corporation engaged principally in the electric utility business. Pepco is a wholly-owned subsidiary of Pepco Holdings, Inc., which is a publicly-held company.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners Potomac Electric Power Company ("Pepco"), Sunil V. Pancholi ("Pancholi"), and David A. Duarte ("Duarte"), respectfully pray that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Di trict of Columbia Circuit entered on May 19, 2006.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit has been reported at 447 F.3d 843 (D.C. Cir. 2006) and is reproduced as Appendix A. The decision of the United States District Court for the District of Columbia was reported at 398 F. Supp. 2d 67 (D. D.C. 2005) and is reproduced as Appendix B. The Order of the United States Circuit Court denying Petitioner's Petition for a Rehearing or Rehearing En Banc is reproduced as Appendix C.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on May 19, 2006. Petitioners filed a petition for rehearing or rehearing en banc on June 19, 2006. The Court of Appeals for the District of Columbia Circuit issued an order denying Petitioners' petition for rehearing or rehearing en banc on July 11, 2006. This petition for a writ of certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(l).

STATUTORY PROVISIONS

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, provides in pertinent part:

UNLAWFUL EMPLOYMENT PRACTICES

SEC. 2000e-2

(a) It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

FEDERAL RULES

Rule 401. Definition of "Relevant Evidence"
"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible
All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time
Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 408. Compromise and Offers to Compromise
Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or Prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

STATEMENT OF THE CASE

In 1993, Petitioner Pepco entered into a consent decree in settlement of a discrimination case brought by African-American employees. Under the terms of the consent decree, Pepco paid $38.3 million dollars to defined classes of employees who alleged they had suffered discrimination. Pepco did not admit to engaging in any discriminatory conduct. By its terms, the consent decree expired in 1998.

The events giving rise to Respondent's Title VII discriminatory termination claim occurred in February-May, 2002. After an investigation in accordance with Pepco's published policies, Petitioners concluded that Respondent, a Caucasian male, was guilty of a "major incident of lack of candor" and a "major incident of unsatisfactory job performance," for failing to tell the truth about an African-American subordinate's absence from work. Respondent was terminated from his position on May 20, 2002.

On May 9, 2003, Respondent filed a Complaint against Petitioners in the D.C. Superior Court, alleging three counts of defamation. The third count was dismissed by the D.C. Superior Court on July 25, 2003. On September 5, 2003, Respondent filed a Complaint in the United States District Court for the District of Columbia alleging reverse race discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq*. On February 18, 2004, Respondent's defamation and discrimination claims were consolidated in the U.S. District Court.

On February 25, 2005, Judge Rosemary Collyer granted Petitioners' Motion for Summary Judgment and dismissed all of Respondent's claims. Respondent filed a timely appeal challenging the District Court's decision to

grant summary judgment on March 25, 2005. The Circuit Court heard oral argument on February 24, 2006. The Panel's decision affirming in part, reversing in part, and remanding the case to the District Court, was issued on May 19, 2006. Petitioners' Petition for a Rehearing or Rehearing En Banc was denied on July 11, 2006. Petitioners challenge that portion of the Circuit Court's Order reversing the District Court's Order and remanding Respondent's discrimination claims to the District Court for further action.

ARGUMENT

I. The Circuit Court's Decision Is Contrary To Federal Law And Public Policy

The United States Court of Appeals for the District of Columbia Circuit has stated that in order to prove a *prima facie* case of discriminatory termination, Respondent must establish: (1) he is a member of a protected class; (2) he suffered an adverse employment action; and (3) his termination gives rise to an inference of discrimination. *George v. Leavitt*, 407 F.3d 405, 412 (D.C. Cir. 2005). To prove the first element of the *prima facie* case in reverse discrimination actions, the employee must prove "additional background circumstances that support the suspicion that the defendant is that unusual employer who discriminates against the majority." *Harding v. Gray*, 9 F.3d 150, 153 (D.C. Cir. 1993).

The Circuit Court improperly considered the expired consent decree, giving it substantial weight in determining that Plaintiff proved a *prima facie* case of reverse discrimination, and holding that the expired consent decree embodied sufficient background circumstances to support an inference of discrimination or discriminatory intent on the part of Petitioner. *Mastro*, 447 F.3d at 852-53. Under federal law and well established public policy promulgated

by Congress and this Court, the Circuit Court's consideration of the consent decree was erroneous.

A. As The Consent Decree Is A Settlement Agreement, It Is Not Admissible As Evidence Of Liability.

A consent decree is a negotiated settlement that is approved by a court. *See* Black's Law Dictionary (8th ed. 2004). The common law and Federal Rule of Evidence 408 prohibit the admission of any evidence of settlement agreements when the evidence is offered to prove liability or the amount of a claim. *See* Fed. R. Evid. 408.

Though the Supreme Court has not specifically opined on the issue, several Circuit Courts have examined the admissibility of civil consent decrees. These Courts consistently conclude that consent decrees are generally inadmissible under Rule 408 and the common law.[1] Depending on the facts of the case, however, the decrees may be admissible for a limited purpose not related to liability or the amount of the claims.[2]

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[1] *See e.g., Reynolds v. Roberts*, 202 F.3d 1303, 1317-18 (11th Cir. 2000) (excluding statements made by attorneys while negotiating consent decree pursuant to Rule 408, even for purposes of interpreting terms of the decree); *United States v. Austin*, 54 F.3d 394, 400 (7th Cir. 1995)("Federal Rule of Evidence 408 prohibits the admission of statements made in the course of settlement to prove liability"); *Johnson v. Hugo's Skateway*, 974 F.2d 1408, 1438 (4th Cir. 1992)("evidence of the consent decree was not admitted to prove the truth of the matters on which compromise had been reached, in violation of Fed. R. Evid. 408"); *United States v. Gilbert*, 668 F.2d 94, 97 (2d Cir. 1981) ("[A] civil consent decree, as the settlement of a civil suit, is governed by Fed. R. Evid. 408."), *cert. denied*, 456 U.S. 946 (1982).

[2] *See e.g., Austin*, 54 F.3d at 400 (criminal intent); *Johnson*, 974 F.2d at 1438 (motive or intent); *Gilbert*, 668 F.2d at 97 (knowledge of SEC reporting requirements).

The consent decree in this case is clearly being offered to prove the liability of Respondents. In *Pierce v. F.R. Tripler & Co.*, 955 F.2d 820 (2d Cir. 1992), the Second Circuit Court of Appeals illustrated the improper use of a previously entered settlement agreement to prove an employer's liability for a subsequent alleged discrimination. The *Pierce* Court held that a settlement offer proffered to prove that the employer was not motivated by discriminatory factors was inadmissible because it related to the employer's liability for the claim. *Id.* at 829. The *Pierce* Court opined:

> In a disparate treatment employment discrimination case, the determinative question is whether, at the time of the adverse employment action, the defendant was motivated by impermissible factors. This is precisely the issue on which [Plaintiff] seeks to introduce the evidence of the job offer. Such evidence on the merits of the case goes to "liability for or the invalidity of the claim" and thus does not fall within the "other purpose" exception to excludability under Rule 408.

Id.

In the instant case, Respondent offered, and the Circuit Court considered, the consent decree as evidence that Petitioners were motivated by discriminatory factors when they decided to terminate Respondent. *Mastro*, 447 F.3d at 852-53. Here, any tendency of Petitioner to favor African-American employees because of the lingering effects of the challenged consent decree relates directly to whether Petitioner's motives in terminating Respondent were improper, and thus, to Petitioner's liability for the claim. Under the plain language of Rule 408, the Circuit Court erred by considering the consent decree as evidence of Petitioner's

liability. Fed. R. Evid. 408. Therefore, this Court should grant certiorari to correct the erroneous conclusions of the Circuit Court, and clarify the admissibility of a consent decree under Rule 408.

B. Allowing Admission Of Consent Decrees Discourages Settlements.

It is the stated policy of Congress and the Federal Courts to encourage the resolution of civil actions through negotiated settlements. The critical importance of this policy has been repeatedly recognized by Congress, by the Supreme Court, and by decisions in all of the Federal Circuits.[3]

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[3] *See e.g. Carson v. American Brands, Inc.*, 450 U.S. 79 (1981) (recognizing the Congressional mandate to encourage settlements); *Williams v. First Nat. Bank*, 216 U.S. 582, 595 (1910)(acknowledging the Supreme Court's interest in encouraging parties to settle); *Advanced Cardiovascular Systems, Inc. v. Medtronic*, 265 F.3d 1294, 1308 (Fed. Cir. 2001); *Hirras v. Nat'l R.R. Passenger Corp.*, 10 F.3d 1142 (5th Cir. 1994); *Johnson v. Occidental Fire and Cas. Co. of North Carolina*, 954 F.2d 1581, 1585 (11th Cir. 1992); *Russell v. PPG Indus., Inc.*, 953 F.2d 326, 333-34 (7th Cir. 1992); *Hudspeth v. Comm'r of IRS*, 914 F.2d 1207, 1213-14 (9th Cir. 1990); *Trebor Sportswear Co. v. Limited Stores, Inc.*, 865 F.2d 506, 510 (2d Cir. 1989); *Janneh v. GAF Corp.*, 887 F.2d 432 (2d Cir. 1989); *Branch v. Fidelity & Casualty Co.*, 783 F.2d 1289, 1294 (5th Cir. 1986); *McInnis v. A.M.F., Inc.*, 765 F.2d 240, 247 (1st Cir. 1985); *Williams v. New Orleans*, 729 F.2d 1554 (5th Cir., 1984); *United States v. Contra Costa County Water Dist.*, 678 F.2d 90, 92 (9th Cir. 1982); *Metro. Hous. Dev. Corp. v. Village of Arlington Heights*, 616 F.2d 1006 (7th Cir. 1980); *Dawson v. Pastrick*, 600 F.2d 70 (7th Cir. 1979); *Reichenbach v. Smith*, 528 F.2d 1072, 1074 (5th Cir. 1976); *Du Pey v. Dep't of Labor*, 519 F.2d 536, 541 (7th Cir. 1975), *cert. denied*, 424 U.S. 965 (1975); *Flinn v. FMC Corp.*, 528 F.2d 1169 (4th Cir. 1975); *Perzinski v. Chevron Chemical Co.*, 503 F.2d 654, 658 (7th Cir. 1974); *Clinton St. Greater Bethlehem Church v. Detroit*, 484 F.2d 185, 189 (6th Cir. 1973); *Cities Serv. Oil Co. v. Coleman Oil Co.*, 470 F.2d 925, 929, (1st Cir. 1973), *cert. denied*, 411 U.S. 967 (1972); *Pfizer, Inc. v. Lord*, 456 F.2d 532, 543 (8th Cir. 1972), *cert. denied*, 406 U.S. 976 (1972); *Stanspec Corp. v. Jelco, Inc.*, 464 F.2d 1184, 1187 (10th Cir. 1972); *Howard v. Comm'r of IRS*, 447 F.2d 152 (5th Cir. 1971); *Autera v. Robinson*, 419 F.2d 1197, 1199 (D.C. Cir. 1969); *Petty v. Gen. Acci. Fire*

Settlements (1) save time; (2) minimize expenses; (3) save taxpayers' money by reducing the time that courts spend resolving disputes; (4) reduce congestion of the courts; and (5) allow the judiciary to avoid deciding questions which do not absolutely have to be decided. Muller & Kirkpatrick, Federal Evidence, § 135 (2005).

Through its approval of Federal Rule of Evidence 408, Congress illustrated its belief that settlements should be encouraged even at the cost of excluding otherwise relevant evidence. The stated purpose of Rule 408 is to encourage settlements and compromises of disputed claims. *See* Advisory Committee Notes (1974 Enactment) to Fed. R. Evid. 408. The Rule notes that parties would be discouraged from entering into settlement agreements if evidence of their statements or the content of the agreements, were admissible to prove their liability in subsequent actions. *Id.* Similarly, the Supreme Court has recognized the purpose of Federal Rule of Civil Procedure 68 is to "encourage settlement and avoid litigation." *See e.g. Marek v. Estate of Chesny,* 473 U.S. 1, 5 (1985).

Congress has further expressed its support for the use of non-judicial resolution in employment cases through its enactment of the Civil Rights laws. The Civil Rights Act of 1991 states:

> Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, *including settlement negotiations*, conciliation, facilitation, mediation, factfinding, minitrails, and arbitration, is encouraged to resolve

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& Life Assur. Corp. 365 F.2d 419, 421 (3d Cir. 1966); *W.J. Perryman & Co. v. Penn Mut. Fire Ins. Co.*, 324 F.2d 791, 793 (5th Cir. 1962).

> disputes arising under the Acts or provisions of Federal law amended by this title.

See Civil Rights Act of 1991, Pub. L. No. 102-166, § 118, 105 Stat. 1071, 1081 (codified at 42 U.S.C. § 1981) (emphasis added).

The Supreme Court has recognized a similar Congressional intent embodied in Title VII, stating, "[i]n enacting Title VII, Congress expressed a strong preference for encouraging voluntary settlement of employment discrimination claims."[4] *Carson v. American Brands*, 450 U.S. 79, 88 (1981) (*citing Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974) (noting that "cooperation and voluntary compliance were selected as the preferred means" of achieving equality of employment opportunities). The *Carson* Court further emphasized the importance of settlements in employment cases, stating:

> Consent decrees are entered into by parties to a case after careful negotiations have produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation.

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[4] The Supreme Court has subsequently quoted this proposition. *See e.g., Local No. 93 v. City of Cleveland*, 478 U.S. 501 (1986); *see also, Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. at 517 (1984) (Blackmun, J. dissenting).

Carson, 450 U.S. at 86-87 *(quoting United States v. Armour & Co.*, 402 U.S. 673, 681 (1971) (emphasis added)).[5] The *Carson* Court's recognition of the Congressional mandate encouraging the non-judicial resolution of workplace grievances has been repeatedly cited in subsequent Federal cases.[6]

Federal cases have generally noted that public policy compels settlement of employment discrimination cases.[7] Other cases have opined more specifically upon the lengthy delays inherent in employment discrimination cases and have reiterated Congress' objective of avoiding such holdups,[8] have noted the ability of parties who settle to avoid, "the

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[5] For further discussion of the advantages a consent decree as a means of settling litigation, *see Local Number 93 v. City of Cleveland*, 478 U.S. 501, 524 (1986).

[6] *Grant v. Local 638*, 373 F.3d 104 (2d Cir. 2004); *United States v. City of Hialeah*, 140 F.3d 968 (11th Cir. 1998); *EEOC v. Astra*, 94 F.3d 738 (1st Cir. 1996); *Marcantel v. Dep't of Transp. & Dev.*, 37 F.3d 197 (5th Cir. 1994); *Janneh v. GAF Corp.*, 887 F.2d 432 (2d Cir. 1989); *Bushey v. New York State Civil Service Comm'n.*, 733 F.2d 220 (2d Cir. 1984); *Ross v. Potter*, 2006 U.S. Dist. LEXIS 385 (D. Kan. 2006); *Fletcher v. Potter*, 2004 U.S. Dist. LEXIS 9323 (S.D.N.Y. 2004); *Greene v. Rumsfeld*, 266 F. Supp. 2d 125 (D.D.C. 2003); *Beavers v. Am. Cast Iron Pipe Co.*, 164 F. Supp. 2d 1290 (N.D. Ala. 2001); *Wileman v. Frank*, 780 F. Supp. 1063 (D. Md. 1991).

[7] *See e.g.. EEOC v. Astra*, 94 F.3d 738 (1st Cir. 1996); *Manders v. Oklahoma*, 875 F.2d 263 (10th Cir. 1989).

[8] *See e.g., Ford Motor Co. v. EEOC.*, 458 U.S. 219, 228 (1982) (stating that lengthy delays "too often attend Title VII litigation," and "In a better world, perhaps, lawsuits brought under Title VII would speed to judgment...quickly...We do not now live in such a world, however."); *see also, Mohasco Corp. v. Silver*, 447 U.S. 807 (1980) (noting that "[b]y choosing what are obviously quite short deadlines [to file EEOC charges], Congress clearly intended to encourage the prompt processing of all charges of employment discrimination").

costs and uncertainties of litigation,"[9] and have encouraged settlements for the purpose of ameliorating judicial economy concerns.[10]

In the instant case, the Circuit Court disregarded the well established policy encouraging parties to settle employment cases. Instead, the Circuit Court not only considered evidence of the expired consent decree, but utilized it as the primary evidence of Petitioner's discriminatory motive in terminating Respondent. *Mastro*, 447 F.3d at 852-53.

The Circuit Court did not provide any guidance or limitations for the use of consent decrees in subsequent cases. *See id.* Instead, the Circuit Court's opinion can be broadly cited to support the admission of any consent decree previously entered into by an employer in any subsequent case with any employee, even after the consent decree has expired. *See id.* Such use of a consent decree is patently unfair to employers who enter into settlements in good faith, and expect the settlement to end their liability.

The Circuit Court further placed no limitations on the necessity for any factual nexus between the circumstances leading up to the previous consent decree and those in the case in which it is subsequently being considered. *See id.* In the instant case, the expired consent decree was between Respondent and a group of minority and female employees.

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[9] *Carson*, 450 U.S. at 87.

[10] *See e.g., Murchison v. Grand Cypress Hotel, Corp,* 13 F.3d 1483, 1486 (11th Cir. 1994) ("We favor and encourage settlements in order to conserve judicial resources."); *Janneh v. GAF Corp,* 887 F.2d 432, 435 (2d Cir. 1989) ("Litigants, courts, and Congress view settlement as a positive force, indispensable to judicial administration. Foregoing formal courtroom procedures, including discovery, trial briefs and arguments, brings substantial benefits to the parties. The costs of litigation are reduced and crowded dockets are relieved.").

It was considered by the Circuit Court as evidence that Respondent, continuing to adhere to the spirit of the expired consent decree, was motivated to discriminate against Petitioner, a Caucasian male. *See id.* It is foreseeable that the same consent decree could also be admitted in a subsequent case brought by a minority employee to support the argument that Petitioner has continuously maintained an environment so hostile to minorities that they previously entered into a consent decree to avoid liability.

Such use of negotiated settlements in subsequent cases, essentially unlimited by any requirement for a temporal or factual connection between the two cases, is sure to discourage employers from entering into consent decrees. Certainly, no practitioner could recommend to a client a settlement via a consent decree that could be used against the party in a subsequent case. Instead, practitioners will advise and employers will insist on going to trial in such cases, knowing that final judgments are likely to be excluded from evidence in subsequent cases as irrelevant or unduly prejudicial.

The Circuit Court's decision directly violates the well established public policy of encouraging the resolution of employment cases through negotiated settlements. This Court should, therefore, accept certiorari to correct the erroneous actions of the Circuit Court, and to reassert the importance of the public policy favoring settlements.

C. Previously Entered Consent Decrees Are Irrelevant And Unduly Prejudicial.

Federal Rules of Evidence 401 and 402 prohibit the admission of evidence that does not tend to make a fact at issue in the case more or less probable than it is without the evidence. Fed. R. Evid. 401, 402. Federal Rule of Evidence 403 requires courts to balance the prejudicial effect of

proffered evidence against its probative value. Consent decrees entered in previous cases are both irrelevant and unduly prejudicial and should be excluded from consideration in subsequent unrelated cases.

The analysis to determine if evidence is admissible under Rule 403 is more than just deciding if the evidence is relevant to the issue. *Coleman v. Home Depot, Inc.*, 306 F.3d 1333, 1343 (3d Cir. 2002). The trial court must balance the probative value of admitting the evidence against prejudicial effects. *Id.* Evidence may be excluded if the probative value will be masked by "unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence" caused by the admission of the evidence. Fed. R. Evid. 403; *see also Coleman*, 306 F.3d at 1343 ("evidence may be excluded if its probative value is not worth the problems that its admission may cause"). The balancing requires one side to include "the maximum reasonable probative force for the offered evidence while the other side of the equation should include the likely prejudicial impact of the evidence." *Id.* at 1344 (quoting Federal Rules of Evidence Manual 242 (Stephen A. Saltzburg et al. eds., 7th ed. 1998)) *See also In re: Paoli Railroad Yard PCB Litigation*, 113 F.3d 444, 453 (1997) (In making a Rule 403 determination, the court must balance the genuine need for the challenged evidence against the risk that the information will confuse the jury and delay the trial.). The weighing exists to guarantee that the jury does not hear evidence that is far more prejudicial than probative. *Id.*

In performing the Rule 403 balancing test, the Fifth Circuit has acknowledged that an "employer's history and work practices may be probative as to its intent to discriminate." *Kelly v. Boeing Petroleum Services, Inc.*, 61 F.3d 350, 360 (5th Cir. 1995). However, often the

"probative value of evidence of past discriminatory acts would be substantially outweighed by the danger of unfair prejudice and confusion of the issues." *Id.*

In *Kolstad v. American Dental Assoc.*, 108 F.2d 1431 (D.C. Cir. 1997), *vacated and remanded on different grounds*, 527 U.S. 526 (1999), the Circuit Court for the District of Columbia affirmed a decision of the District Court excluding admission of a previously entered consent decree because its probative value was substantially outweighed by the potential prejudice to the defendants. *Id.* at 1439 (citing Fed. R. Evid. 403). Other courts have also excluded consent decrees in employment discrimination actions on the grounds that they were irrelevant to the claims at issue, and unduly prejudicial to the employers.

In *Payne v. General Motors Corp.*, 943 F.2d 57, 1991 WL 172659, *1 (10th Cir. 1991) (Unpublished) the plaintiff offered a consent decree entered in settlement of an unrelated class action to establish the employer's notice of minority dissatisfaction, and to provide the "true context" of Payne's discrimination claims. The Tenth Circuit declined to find any error in the exclusion of a consent decree, stating:

> [w]hat relevance, if any, such evidence may have had in this case on the matter of notice was clearly outweighed by the unfairly prejudicial effect it plainly would have had in erroneously, but effectively, suggesting to the factfinder that [the employer] had admitted its appraisal system was in fact discriminatory.

Id. at *1 (citing Fed. R. Evid. 401, 403).

The U.S. District Court for the Southern District of New York reached a similar conclusion in *Dodson v. CBS*

Broad., Inc., 423 F. Supp. 2d 331, 334 (S.D. N.Y. 2006). The *Dodson* Court held that the decrees were inadmissible to show that the employer was "favoring women, because of said decrees," and to show a "propensity for generalized sex discrimination...that is inconsistent with Title VII," stating:

> [t]he 'limited probative value of [the consent decrees],' however, 'is substantially outweighed by the burden that the admission of this evidence would place on [defendant] to explain the circumstances at issue in [the prior settlement], by the waste of time that would accompany such explanations, and by the danger that admission of this evidence will create unfair prejudice against [defendant].'

Id. at 334 (citing Fed. R. Evid. 402, 403; *In re: WorldCom, Inc. Sec. Litig.*, 2005 WL 578109, at *2 (S.D. N.Y. 2005) (Unpublished); *Figueroa v. Boston Scientific Corp.*, 2003 WL 21488012, at *4 (S.D. N.Y. 2003) (Unpublished)).

There was no temporal or factual nexus between the previously entered consent decree and Respondent's claims in this case. The consent decree in question was entered in 1993 and expired in 1998. The events culminating in Respondent's termination occurred between February and May of 2002. Respondent does not allege that any of the managers that participated in the decision to terminate his employment were actors in the original decree. Nor does Respondent contend that there is any similarity between the discrimination alleged in the previous case which resulted in the consent decree and his own case. Respondent's only argument is that Petitioner was motivated to discriminate against Caucasian employees out of adherence to the long expired consent decree. The relevance of the consent decree

to the issues in Respondent's case can be described as tenuous, at best.

The Circuit Court considered the consent decree to "the extent to which a reasonable jury could believe it might encourage Pepco management to treat minority employees in a preferential manner." *Mastro*, 447 F.3d at 852-53. Courts have cautioned that a jury could "easily" consider the admission of a consent decree as proof of past discrimination regardless of a limiting jury instruction. *Johnson v. Hugo Skateway*, 974 F.2d 1408, 1439 (4th Cir. 1992) (Murnaghan, J., dissenting). Given the limited relevance, and the highly prejudicial nature of the consent decree in this case, the Circuit Court erred by considering the consent decree as evidence. This court should, therefore, issue a writ of certiorari to correct the erroneous decision of the Circuit Court, and to clarify the admissibility of the subject consent decree.

D. The Circuit Court Erred By Analyzing The Consent Decree As An Affirmative Action Plan.

In the instant case, the Circuit Court concluded that the long expired consent decree constituted sufficient background circumstances to satisfy the first element of a *prima facie* case of reverse discrimination. *Mastro v. Pepco*, 447 F.3d 843, 852-53 (D.C. Cir. 2006). The Court avoided analyzing any of the admissibility issues discussed above by improperly characterizing the consent decree as an affirmative action plan, *Id.* at 852, and analyzing its admissibility under precedents allowing the admission of affirmative action plans. *Id.* In doing so, the Circuit Court failed to fully consider the unique attributes of a consent decree that make its admission into evidence improper.

A consent decree is not an affirmative action plan. A consent decree is a negotiated settlement that is reviewed and approved by a court. *See* Black's Law Dictionary (8th ed. 2004). A consent decree is further subject to continued judicial oversight to ensure its enforcement. *Williams v. Vukovick*, 720 F.2d 909, 920 (6th Cir. 1983). An affirmative action plan is a program which is designed to remedy past societal discriminatory practices in the employment of minorities and is required by Executive Order 11246 for all government contractors. *See* Black's Law Dictionary (8th ed. 2004). Affirmative action plans are drafted solely by the employer, and their terms are not negotiated with any adverse party.

Consent decrees and affirmative action plans are substantively and doctrinally different. Most persuasively, consent decrees entered in previous cases are inadmissible to prove Petitioners' liability for discrimination. Fed. R. Evid. 401, 402, 403, 408. There are no analogous rules prohibiting the Court's admission of evidence of an affirmative action plan. Also, whereas employers, such as Petitioner Pepco, were required under Executive Order 11246 to have lawful affirmative action plans in place, negotiation and settlement of discrimination cases through the use of consent decrees is entirely voluntary. *See* Executive Order 11246 (Sept. 24, 1965), 30 FR 12319, 12935, 3 C.F.R., 1964-1965 Comp., 339. Prior to the entry of a consent decree as a final judgment, the fairness and legality of every consent decree is considered by the Court. *See e.g. United States v. Trucking Employers, Inc.*, 561 F.2d 313, 317 (D.C. Cir. 1977) ("Prior to approving a consent decree a court must satisfy itself of the settlement's 'overall fairness to beneficiaries and consistency with the public interest.'"). Most affirmative action plans receive no judicial consideration. Finally, an employer's development and adoption of an affirmative action plan may be much more indicative of political pressure to advance minorities than is the negotiation and settlement

of a pending case through a consent decree which is often motivated by the employer's desire to avoid the projected cost of litigation. *See Carson*, 450 U.S. at 86-87.

Clearly there are concerns that the Court must weigh when deciding the admissibility of a consent decree, which are not implicated in the Court's consideration of an affirmative action plan. Therefore, case law regarding the admission of one is not directly applicable to the other. The Panel's application of case law regarding the admissibility of affirmative action plans was inappropriate in this case where no affirmative action plan was at issue.

The Circuit Court's failure to properly consider the admissibility of the consent decree, and its subsequent conclusion that the consent decree constituted sufficient background circumstances to satisfy the first element of a prima facie case for reverse discrimination, were erroneous. For all the foregoing reasons, this Court should accept certiorari to correct the improper judgment of the Circuit Court, and to clarify the admissibility of consent decrees.

II. The Question Of Whether Consent Decrees Are Admissible As Evidence Of Discrimination Or Discriminatory Intent Has Not Been, But Should Be, Decided By This Court.

The Supreme Court has never addressed the issue of whether a previously entered consent decree is admissible as evidence in a future case between different parties. It is imperative that the Court clarify the admissibility of such decrees in the interests of justice and judicial economy.

III. The Challenged Decision Conflicts With The Decisions Of Other Courts.

The decision of the Circuit Court for the District of Columbia to consider an expired consent decree entered in a previous discrimination case as evidence of Petitioners intentional discrimination against Respondent is in direct conflict with a published decision of the Sixth Circuit. This Court should accept certiorari to resolve the conflict between the Circuits and clarify the admissibility of consent decrees.

Very few courts have specifically addressed the admissibility of an employer's previously entered consent decree in a subsequent action for reverse discrimination. In *EEOC v. McCall Printing Corp.*, 633 F.2d 1232 (6th Cir. 1980), the Sixth Circuit held that a previously entered consent decree granting retroactive seniority to female employees could not form the basis of a valid Title VII action by male employees who were adversely affected.[11] *Id.* at 1237.

The Court reasoned that to allow the aggrieved employees to claim damages from a validly entered consent decree would greatly undermine employers' incentive to enter into consent agreements. *Id.* at 1238. The Court

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[11] In a subsequent case, the Sixth Circuit affirmed a decision of the Northern District of Ohio to approve a consent decree which included certain race conscious relief. The Court held that approving the consent decree was not an abuse of discretion, as non-minority employees had no legally protected interest in job actions that could only be accomplished through discriminatory employment practices, and so the legal rights of non-minority employees were not adversely affected by the reasonable and lawful remedies included in the consent decree. *Vanguards of Cleveland v. City of Cleveland*, 753 F.2d 479, 485 (6th Cir. 1985), *aff'd by Local No.93, Intern. Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S.501 (1986) (citing *Kirkland v. New York State Dept. of Correctional Services*, 711 F.2d 1117, 1126 (2d Cir. 1983)).

further reasoned that admitting the consent decree would raise innumerable factual questions requiring comparison of similarly situated employees to determine if they received the same benefits and would require the constant reconsideration of claims raised and settled in previous cases to determine their applicability to the claims before the Court. *Id.*

As discussed at length above, the decision of the Circuit Court allowing consideration of the expired consent decree is also in conflict with the decisions of the Second Circuit in *Pierce v. F.R. Tripler & Co.*, 955 F.2d 820 (2d Cir. 1992), the Tenth Circuit in *Payne v. General Motors, Corp.*, 943 F.2d 57 (10th Cir. 1991) (Unpublished), and the U.S. District Court for the Southern District of New York in *Dodson v. CBS Broadcasting, Inc.*, 423 F. Supp. 2d 331 (S.D. N.Y. 2006) where consent decrees were excluded under Rules 402, 403, and 408, as irrelevant, unduly prejudicial, and as evidence of liability contained in settlement agreements.

In order to clarify whether previously entered consent decrees are admissible in subsequent cases, and to resolve the conflicts between the decisions of the Circuit Courts, this Court should grant this petition for certiorari to more fully consider the issues raised.

CONCLUSION

The Circuit Court for the District of Columbia erred by considering evidence of a previously entered consent decree in this case. As the consent decree was the negotiated settlement of a previous case, it was inadmissible to prove Petitioner's liability under Federal Rule of Evidence 408. The essentially unlimited admission of consent decrees as permitted in this case, is contrary to the well established public policy encouraging the non-judicial resolution of

employment cases, and is sure to discourage employers from entering into consent decrees in the future. Furthermore, evidence about the consent decree should have been excluded as irrelevant and unduly prejudicial under Federal Rules of Evidence 401, 402, and 403. The Circuit Court for the District of Columbia avoided the consideration of these important issues by incorrectly analyzing the consent decree as an affirmative action plan. The decision of the Circuit Court of the District of Columbia is also in conflict with the published decisions of other Federal Courts.

For all of the foregoing reasons, this Court should grant this petition and issue a writ of certiorari to further consider the issues in this case.

Respectfully submitted,

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APPENDIX A

DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued February 24,2006 Decided May 19, 2006

[ENTERED May 19, 2006]

No. 05-7044

BRIAN A. MASTRO,
APPELLANT
v.

POTOMAC ELECTRIC POWER COMPANY, ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No.03cv01865)

Charles W. Day, Jr. argued the cause for appellant. With him on the briefs was *Joseph D. Gebhardt.*

James P. Gillece, Jr. argued the cause and filed the brief for appellee.

Before: GINSBURG, *Chief Judge,* and ROGERS and BROWN, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* BROWN.

BROWN, *Circuit Judge:* After he was terminated for a purported lack of candor, Appellant Brian Mastro filed suit against his employer, Potomac Electric Power Company (Pepco), and two supervisors (collectively, Appellees), alleging (1) discrimination in violation of Title VII of the Civil Rights Act of 1964 and (2) defamation. The district

court granted summary judgment to Appellees. We affirm the district court's decision with respect to the defamation claims; however, we disagree with the court's determination that Mastro failed to demonstrate a prima facie case of reverse discrimination and ultimately conclude he raised a genuine issue of material fact concerning the legitimacy of Pepco's nondiscriminatory reason for his termination, specifically, whether it was due to a lack of candor, as Appellees contend, or to discrimination, as Mastro asserts. Accordingly, we reverse and remand Mastro's discrimination claim for further proceedings.

I

Brian Mastro, a Caucasian, began working for Pepco in 1989 as a system engineer. He was promoted in 1996 and served as Distribution Project Engineer, Underground High Voltage at the time of the events giving rise to this litigation. Prior to the episode central to this case, Pepco had never disciplined Mastro, and his supervisors had no reason to question his honesty.

One of the people Mastro supervised was a probationary employee, Donald Harsley, an African-American who had worked at Pepco for less than a year. On Sunday, February 17, 2002, Harsley was arrested and jailed after he confronted an ex-girlfriend and threatened to kill her and burn down her home and place of employment. As a result, he was absent from work beginning Tuesday, February 19, through Friday, February 22.[1] He returned to work the following Monday, February 25.

The date Mastro learned Harsley was actually in jail is the crux of the dispute that eventually led to Mastro's

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[1] Monday, February 18 was the President's Day holiday, and Harsley was not required to be at work that day.

termination. Harsley claims he was always candid about his circumstances. He maintains he left a phone message for Mastro on the evening of Monday, February 18, requesting two days of vacation because he was in jail. He also claims he spoke to Mastro on the evenings of Tuesday, February 19, and Wednesday, February 20, telling Mastro that he was still incarcerated and needed more vacation time, which Mastro granted.

Mastro, in contrast, contends he was unaware Harsley was in jail until Wednesday afternoon or Thursday morning of that week. According to Mastro, he initially received a phone call from Harsley's girlfriend on Tuesday asking if Harsley could receive vacation time. Mastro insisted Harsley must personally request vacation time, and later that evening, Harsley called, explaining that he had been arrested for "family problems" and needed time off to resolve the matter. Mastro says that though he approved the vacation, he did not know at the time that Harsley was in jail; he did not ask about it, nor did he have reason to suspect as much. He maintains he only learned of Harsley's incarceration during another phone call with Harsley that took place on either the afternoon of Wednesday, February 20, or the morning of Thursday, February 21. During that subsequent call, Mastro, acting on workplace rumors, asked Harsley if he was in jail, which Harsley admitted. It is undisputed that on Thursday, February 21, Mastro informed his supervisor, Sunil Pancholi, who is of East Indian descent, that Harsley was incarcerated.

Pepco initially planned to fire Harsley for lying to Mastro, his supervisor, about his whereabouts when he asked for vacation time. At a meeting with Harsley and his union representatives in early April, however, company officials reconsidered after Harsley described his version of events and claimed that Mastro had always known Harsley's whereabouts when he granted the vacation time. James Bryant, an African-American employee who was one of

Mastro's "lead" men (that is, second-in-command) and kept the timesheets for Mastro's team, was called into the meeting. Bryant stated that on the morning of Tuesday, February 19, Mastro had told him to mark Harsley down for vacation because Harsley was incarcerated.

Because the information revealed at the meeting appeared to contradict Mastro's earlier representations, Pepco launched an internal investigation, headed by David Duarte, an African-American employed as a Senior Employee Relations Investigator with Pepco, to determine who, if anyone, had been untruthful. Duarte spoke to Harsley, who stuck to the story that he had notified Mastro on Monday, February 18th, that he was in jail and needed vacation. Duarte also spoke with Bryant, the timekeeper, who repeated his statement regarding Mastro's purported knowledge of Harsley's incarceration on Tuesday, February 19th. Duarte interviewed a third employee, Jose Smith, who said that on Tuesday, February 19, Mastro had asked him if he knew Harsley's girlfriend's phone number. According to Smith, Mastro explained that he needed to get in touch with her because he had received a phone message from Harsley indicating Harsley was in jail, but he had no way to contact Harsley. While Duarte was conducting his investigation, Pancholi held a meeting with Mastro, which Duarte attended, to explain to Mastro the contradictory accounts and to hear Mastro's side of the story. Mastro continued to insist that he was unaware of Harsley's incarceration until later in the week in question, and, following the meeting, he provided a written account of his version of events.

Pepco officials ultimately concluded that Mastro had not been truthful. On May 10, 2002, Pancholi issued a memorandum to Mastro placing him on crisis suspension due to "serious/major incidents of lack of candor and a serious/major incident of unsatisfactory performance." The memorandum informed Mastro that his discharge was

warranted and requested his presence at a May 14 meeting to discuss his future employment. At that meeting, Mastro persisted in maintaining his innocence. Immediately afterward, Pancholi, Duarte, and another Pepco official decided that, barring any new findings in the following week, Mastro would be terminated. Further investigation failed to uncover any new information, and on May 20, Pancholi issued Mastro a memorandum terminating his employment for the same reasons stated in the May 10 memorandum.[2] The memoranda documenting Mastro's termination were circulated to certain members of Pepco's management and Employee Relations Department and to the District of Columbia Department of Employment Services.[3]

Mastro initially filed a defamation suit against Pepco, Pancholi, and Duarte in the District of Columbia Superior Court and a discrimination suit against the same defendants in the United States District Court for the District of Columbia. The claims were eventually consolidated in the district court. Mastro's second amended complaint alleges one count of discriminatory termination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, and two counts of defamation based on purportedly improper publication of the May 10 and May 20 memoranda (collectively, the termination memoranda). Appellees moved

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[2] As for Harsley, Pepco officials concluded that he had been truthful, but they extended his probationary employment status to eighteen months for unexcused absences stemming from his time in jail

[3] Pepco officials transmitted the memoranda to the D.C. Department of Employment Services pursuant to the government's "Request for Separation Information" following Mastro's application for unemployment benefits. District of Columbia law places additional conditions for the receipt of benefits on "any individual who has been discharged for gross misconduct occurring in his most recent work." D.C. Code § 51-110(b)(1).

for summary judgment on all counts, which the district court granted. *Mastro* v. *Pepco,* 398 F. Supp. 2d 67, 78 (D.D.C. 2005). On the discrimination count, the district court concluded Mastro had failed to establish a prima facie case of discrimination because, first, he had not established sufficient "background circumstances" suggesting Appellees tended to discriminate against white employees; and, second, he did not produce evidence that he was replaced by someone outside his protected class or that similarly situated persons outside of his class were retained. *Id.* at 76. On the defamation counts, the district court concluded Mastro failed to produce evidence that Appellees published the termination memoranda outside the scope of applicable privileges. *Id.* at 78. Mastro timely appealed.

II

We review the district court's grant of summary judgment de novo. *Holcomb* v. *Powell,* 433 F.3d 889, 895 (D.C. Cir. 2006). Summary judgment is appropriate only if the pleadings, depositions, answers to interrogatories, admissions, and affidavits filed pursuant to discovery show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247-48 (1986). We view the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in its favor. *Reeves v. Sanderson Plumbing Prods.,* 530 U.S. 133, 150 (2000). We will affirm only if no reasonable jury could find in favor of the nonmoving party. *Salazar v. Wash. Metro. Area Transit Auth.,* 401 F.3d 504, 507 (D.C. Cir. 2005).

A

We begin with Mastro's discrimination claim. Title VII makes it unlawful for an employer "to discharge any

individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(l). The protections of Title VII apply to minority and nonminority employees alike. *McDonald v. Santa Fe Trail Tramp. Co.*, 427 U.S. 273, 278-80 (1976). "The emphasis of both the language and the legislative history of the statute is on eliminating discrimination in employment; similarly situated employees are not to be treated differently solely because they differ with respect to race, color, religion, sex, or national origin." *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 71 (1977). "This is true regardless of whether the discrimination is directed against majorities or minorities." *Id.* at 71-72.

Where, as here, a plaintiff produces no direct evidence of discrimination, we analyze a Title VII claim under the familiar burden-shifting framework *of McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), initially placing the burden on the plaintiff to establish a prima facie case of discrimination, *id.* at 802; shifting it to the defendant employer "to articulate some legitimate, non-discriminatory reason" for the employment action, *id.*; and shifting it back to the plaintiff to prove by a preponderance of the evidence that the proffered reasons are a pretext for discrimination, *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

The district court employed a four-part framework to assess the prima facie case, requiring a plaintiff to show (1) membership in a protected class; (2) performance at or near the level legitimately expected by the employer; (3) discharge; and (4) replacement by a person outside the protected class or retention of similarly situated individuals outside the protected class. *Mastro*, 398 F. Supp. 2d at 74 (quoting *Waterhouse v. District of Columbia*, 124 F. Supp.

2d 1, 5 (D.D.C. 2000) (citing *Kidane v. Northwest Airlines, Inc.*, 41 F. Supp. 2d 12, 17 (D.D.C. 1999))). This is not a correct statement of the law. "We have made clear that a plaintiff makes out a prima facie case of disparate-treatment discrimination by establishing that: (1) she is a member of a protected class; (2) she suffered an adverse employment action; and (3) the unfavorable action gives rise to an inference of discrimination." *George v. Leavitt,* 407 F.3d 405, 412 (D.C. Cir. 2005) (quoting *Stella v. Mineta,* 284 F.3d 135, 145 (D.C. Cir. 2002) (quoting *Brown v. Brody,* 199 F.3d 446, 452 (D.C. Cir. 1999))) (internal quotation marks omitted). A plaintiff may satisfy the third prong of this test by "demonstrating that she was treated differently from similarly situated employees who are not part of the protected class," *id.* (citing *Holbrook* v. *Reno,* 196 F.3d 255, 261 (D.C. Cir. 1999)), or, in the specific context of a discharge claim, showing that she was not terminated for "the two . . . common legitimate reasons for discharge: performance below the employer's legitimate expectations or the elimination of the plaintiffs position altogether," *id.* Contrary to the district court's view, we have expressly rejected as immaterial a requirement that the plaintiff be replaced by an individual outside her protected class. *Id.* at 412-13; *Stella,* 284 F.3d at 146. The plaintiff need only show that the position continues to exist and was filled—sufficient proof that the position was not simply eliminated.

In the context of reverse discrimination claims, the prima facie framework is tweaked once more. In the standard Title VII case, that is, where the plaintiff is a member of a minority group, an inference of discrimination arises when the employer merely carries out an adverse employment action, such as nonpromotion or termination, against the plaintiff. *Harding v. Gray,* 9 F.3d 150, 153 (D.C. Cir. 1993). But "there is nothing inherently suspicious" about an employer's decision to promote a minority applicant instead of a white applicant, *id.,* or to fire a white employee. As a

result, a majority-group plaintiff alleging Title VII discrimination must show "additional background circumstances that support the suspicion that the defendant is that unusual employer who discriminates against the majority." *Id.* (quoting *Parker v. Balt. & Ohio R.R.*, 652 F.2d 1012, 1017 (D.C. Cir. 1981)) (brackets and internal quotation marks omitted). This "background circumstances" requirement modifies the first prong of the prima facie framework; it "substitutes for the minority plaintiffs burden to show that he is a member of a racial minority." *Id.* It is "not designed to disadvantage the white plaintiff," *id.*, but "means simply that in our society, where 'reverse discrimination' is the exception, white plaintiffs must show more than the mere fact that they are white" before an adverse employment action against them will raise an inference of discrimination, *id.* at 154; *see also Mills v. Healthcare Serv. Corp.*, 171 F.3d 450, 457 (7th Cir. 1999); *Duffy v. Wolle*, 123 F.3d 1026, 1036-37 (8th Cir. 1997); *Reynolds v. Sch. Dist. No. 1*, 69 F.3d 1523, 1534 (10th Cir. 1995); *Murray v. Thistledown Racing Club, Inc.*, 770 F.2d 63, 67 (6th Cir. 1985). *But see Iadimarco v. Runyon*, 190 F.3d 153, 160-61 (3d Cir. 1999) (rejecting this requirement); *Lucas v. Dole*, 835 F.2d 532, 534 (4th Cir. 1987) (declining to decide whether to adopt this requirement).

Two general categories of evidence constitute "background circumstances." The first is evidence indicating the particular employer "has some reason or inclination to discriminate invidiously against whites." *Harding*, 9 F.3d at 153. Within this category, we have found sufficient such evidence as political pressure to promote a particular minority because of his race, pressure to promote minorities in general, and proposed affirmative action plans. *See Bishopp v. District of Columbia*, 788 F.2d 781, 787 (D.C. Cir. 1986); *Lanphear v. Prokop*, 703 F.2d 1311, 1315 (D.C.

Cir. 1983).[4] The second category is evidence indicating that "there is something 'fishy' about the facts of the case at hand that raises an inference of discrimination." *Harding,* 9 F.3d at 153. Within this category, we have found the following circumstances sufficient: evidence that a plaintiff was given "little or no consideration" for a promotion and that the supervisor never fully reviewed the qualifications of the minority promotee, *Lanphear,* 703 F.2d at 1315; and evidence that a minority applicant was promoted over four objectively better-qualified white applicants "in an unprecedented fashion," *Bishopp,* 788 F.2d at 786. A plaintiff may establish "background circumstances" by proffering evidence from either of the two general categories; evidence from both is not necessary. *Harding*, 9 F.3d at 153. Additionally, such circumstances may arise from either the employer's general background or the background of the case at hand. *Id.* In short, the burden for demonstrating "background circumstances" sufficient to sustain a prima facie case of reverse discrimination is minimal, in keeping with our belief that the requirement is not intended to be "an additional hurdle for white plaintiffs," *id.* at 154, and the general understanding that the plaintiff's burden of establishing a prima facie case of discrimination under the *McDonnell Douglas* framework is "not onerous." *Burdine,* 450 U.S. at 253.

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[4] In *Parker,* we noted that "a lawful affirmative action program" would not necessarily "in itself constitute suspicious circumstances" justifying an inference of discrimination. 652 F.2d at 1018 n.9. Subsequently, however, in *Bishopp* and *Lanphear,* we acknowledged that where an employer was in the process of drafting or adopting an affirmative action plan, this contributed, in combination with other factors, to the creation of sufficient "background circumstances." *See Bishopp,* 788 F.2d at 787; *Lanphear,* 703 F.2d at 1315.

The district court determined Mastro failed to establish sufficient "background circumstances" to support a suspicion that Pepco discriminates against white employees. *Mastro,* 398 F. Supp. 2d at 76. The court found Mastro leveled only conclusory allegations of discrimination, for example, testifying he had a "gut feeling" discrimination prompted his termination or merely asserting that his supervisors acted against him in order to benefit two African-American employees, Harsley and Bryant.[5] *Id.* The district court also referred to a 1993 consent decree through which Pepco settled a race and gender discrimination class action. *Id.* The consent decree, which expired in 1998, required Pepco to pay $38 million into a settlement fund and take "certain affirmative steps." Defs.' Suppl. Resp. to Pl.'s Req. for Admis. of Facts 1. These "facts and unsupported allegations," the district court held, established "only a finding that [Mastro] was dismissed in a perfunctory manner for what appears to be an isolated incident of apparent misconduct," not "background circumstances" giving rise to an inference of discrimination. *Mastro,* 398 F. Supp. 2d at 76. We disagree.

To begin with, the district court accorded too little weight to the 1993 consent decree. Were Pepco still legally obliged to adhere to its terms, we would doubtless consider it probative evidence of "background circumstances," just as we have previously found proposed affirmative action plans satisfy the standard. *See Bishopp,* 788 F.2d at 786-87; *Lanphear,* 703 F.2d at 1315; *cf. Ineichen v. Ameritech,* 410 F.3d 956, 960 (7th Cir. 2005) (noting that reverse discrimination "is not surprising" when management is "under pressure" from, *inter alia,* "a judicial decree"). Yet it is unreasonable to assume that because the consent decree

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[5] After Mastro's termination, Bryant was one of two individuals who assumed the role of Acting Supervisor of Mastro's team

nominally expired in 1998, Pepco immediately ended the "affirmative steps" it had established pursuant to the decree's terms, or that the decree's lingering effects were not still felt four years later when the events giving rise to this litigation took place. Indeed, the point of many consent decrees is to implement short-term measures that precipitate a paradigm shift having long-term, if not permanent, effects. Thus, we accord some significance to the consent decree and the extent to which a reasonable jury could believe it might encourage Pepco management to treat minority employees in a preferential manner.

Record evidence suggesting reluctance by Pepco management to impose discipline on African-American employees bolsters this view. Mastro offered testimony, unchallenged by Appellees, that one of the African-American employees he supervised, Nelson Daniels, thrice violated company policy or work procedures, costing Pepco thousands of dollars in repairs as a result. In each instance, Mastro recommended to Pancholi that Daniels be disciplined, but Pancholi refused to do so; according to Mastro, Pancholi cited concerns about not wanting to "stir up the pot" or "create controversy." Another time when Mastro sought discipline against an African-American employee, he claims he was specifically instructed not to do anything about the situation "because [the employee] is black." Mastro also testified about a heated confrontation with James Bryant, Mastro's immediate subordinate, during which Bryant approached him in a physically threatening manner

and had to be held back by another employee.[6] Mastro claims that Pancholi refused to discipline Bryant upon Mastro's request, even though Bryant's behavior manifestly violated company policy. For his part, Pancholi testified that he actually supported Mastro's recommendation to discipline Bryant, dropping the matter only upon Mastro's demand several days later. Despite this conflict in testimony, however, we believe that by itself and in conjunction with the recently expired consent decree, the evidence Mastro has presented is sufficient for a reasonable jury to discern sufficient "background circumstances" to support a suspicion that Pepco is "the unusual employer who discriminates against the majority." *Harding,* 9 F.3d at 153 (internal quotation marks omitted). Given Mastro's low evidentiary burden at this point in the analysis, he has demonstrated the first prong of his prima facie case.

Mastro also satisfies the remaining elements of his prima facie case. It is undisputed that he was discharged, thereby satisfying the second prong. *See Brown,* 199 F.3d at 456-57. He may satisfy the third and final prong by demonstrating either that he was not performing below his

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[6] Mastro's description is livelier:

Q: "You said Bryant had to be subdued, who subdued him?"

A: "Mike Tyson."

Q: "Mike Tyson?"

A: "That is correct."

Q: "How did Mike Tyson subdue him?"

A: "He held him back. There was no exchange of blows or anything, it was more or less just being in my face. . . . And Mike kind of held him back and said you could be fired for this, get back, blah, blah, blah, that type of thing."

Q: "He went back?"

A: "Well, Mike is much bigger than James Bryant. He kind of carried him back."

employer's legitimate expectations and was replaced, or that he was treated differently from similarly situated employees who are not part of his protected class. Without addressing the second of these alternatives, we conclude Mastro meets the first of them. Appellees do not dispute that, prior to the Harsley incident, Mastro had been an excellent employee with a clean disciplinary record. They argue, however, that because Pepco believed Mastro lied about his knowledge of Harsley's incarceration, and because lying to one's employer necessarily constitutes performance below legitimate expectations, Mastro therefore performed below Pepco's legitimate expectations. As the district court concluded, this conclusion cannot logically follow. *See Mastro,* 398 F. Supp. 2d at 75 n.6. The conduct alleged by a Title VII plaintiff to be tainted by the employer's discrimination cannot serve as evidence that the employee was performing below the employer's legitimate expectations. Otherwise, any employer could routinely evade Title VFI's protections by accusing an employee of misconduct, firing him, and claiming that the employee failed to demonstrate a prima facie case of discriminatory termination because his alleged misconduct constituted performance below legitimate expectations. Appellees' argument to this end is therefore unavailing.

The record also shows that Mastro was replaced after his termination. According to Pancholi, two individuals whom Mastro had previously supervised, James Bryant and Loman Dudley, served as Acting Supervisors following Mastro's discharge. Appellees suggest that because Mastro's position has not been permanently filled, it cannot be said that he has been "replaced." But whether a terminated Title VII plaintiffs position has been filled on a temporary or permanent basis should not affect the determination of whether the position has been filled for purposes of the prima facie case. The "replacement" requirement serves to weed out claims of discriminatory termination where the plaintiff was discharged simply because his job was being

eliminated. So long as a plaintiff shows that another individual replaced him, it is safe to conclude the plaintiff's job was not eliminated. This burden is met even when an employer fills the position temporarily. Indeed, it is not unusual for employers to fill vacant positions on an interim basis until a permanent replacement is found. The very fact that Pepco deemed it necessary to appoint a temporary supervisor after Mastro's termination illustrates the continuing need for someone in that position.[7] We therefore conclude that Mastro has demonstrated a prima facie case of discriminatory termination.

Mastro having satisfied his burden of establishing a prima facie case, the burden shifts to Appellees to articulate a legitimate, nondiscriminatary reason for Firing Mastro. *McDonnell Douglas,* 411 U.S. at 802. Appellees' burden is merely one of production, and here, they produce evidence "sufficient for the trier of fact to conclude" Mastro was terminated because of Pepco's belief that he lied. *Reeves,* 530 U.S. at 142. Lying constitutes a dischargeable offense, and thus Appellees have satisfied the second prong of *McDonnell Douglas.*

Appellees having offered a legitimate, nondiscriminatory explanation for terminating Mastro, "the

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[7] Appellees also claim that Mastro has not demonstrated that any of the employees who replaced him possessed qualifications equal to or less than his own, which they contend our decision in *Neuren v. Adduci, Mastriani, Meeks & Schill,* 43 F.3d 1507 (D.C. Cir. 1995), mandates. *See id.* at 1512. In *Neuren,* however, this element was a dictum, an alternative requirement the court recited but did not employ. None of our subsequent articulations of the prima facie framework has embraced it, and for good reason: as noted, the replacement element is merely a proxy, and requiring the plaintiff to demonstrate that his replacement has equal or lesser skills goes "beyond what is necessary to create an inference of discrimination." *George,* 407 F.3d at 413.

presumption of discrimination 'simply drops out of the picture,'" *Holcomb*, 433 F.3d at 896 (quoting *Burke v. Gould*, 286 F.3d 513, 520 (D.C. Cir. 2002) (quoting *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993)) (internal quotation mark omitted)), and "the sole remaining issue [i]s discrimination *vel non*." *Reeves*, 530 U.S. at 142 (quoting *U.S. Postal Serv. Bd. of Governors v. Athens*, 460 U.S. 711, 734 (1983)) (internal quotation marks omitted). "At this point, 'to survive summary judgment the plaintiff must show that a reasonable jury could conclude from all of the evidence that the adverse employment decision was made for a discriminatory reason.'" *Holcomb*, 433 F.3d at 896 (quoting *Lathram v. Snow*, 336 F.3d 1085, 1088 (D.C. Cir. 2003)).

> By 'all of the evidence,' we mean any combination of (1) evidence establishing the plaintiffs prima facie case; (2) evidence the plaintiff presents to attack the employer's proffered explanation for its actions; and (3) any further evidence of discrimination that maybe available to the plaintiff, such as independent evidence of discriminatory statements or attitudes on the part of the employer.

Id.; Aka v. Wash. Hosp. Ctr., 156 F.3d 1284, 1289 (D.C. Cir. 1998) (en banc).

For a number of reasons, we believe Mastro has offered "ample evidence by which a reasonable jury could conclude" that Pepco's stated reasons for terminating him were pretextual and that discrimination motivated its decision. *George*, 407 F.3d at 413. Record evidence suggests that Duarte's investigation, which was central to and culminated in Mastro's termination, was not just flawed but inexplicably unfair. First, Duarte interviewed several

individuals, but, curiously, not Mastro himself. Admittedly, Mastro was given an opportunity to offer his version of events, but only at a later date when management had already received the results of Duarte's investigation, putting Mastro on the defensive and depriving him of the same opportunity that was given to Harsley, whom Duarte did interview. For Duarte to have spoken to everyone in the normal course of his investigation except the individual at the center of the controversy—and the only Caucasian—might well strike a jury as odd.[8]

Second, the investigation Duarte did conduct prior to delivering his findings to management lacked the careful, systematic assessments of credibility one would expect in an inquiry on which an employee's reputation and livelihood depended. For example, while Duarte and Pepco management appeared to rely heavily on James Bryant's statements in concluding that Mastro had been untruthful, a reasonable jury could find Bryant's credibility questionable. The record reveals that Bryant and Mastro had a strained working relationship and that Bryant, as a second-in-command to Mastro, stood to gain from disciplinary action against his boss. Mastro testified that on "numerous occasions" Bryant displayed "major insubordination" towards him. As noted, on one especially tense occasion, according to Mastro, Bryant accosted Mastro with "fists raised" and "had to be subdued" by another employee. In his

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[8] Duarte's failure to conduct an evenhanded inquiry was not only irregular but imprudent. The operative concepts at the center of the dispute—"arrested" versus "incarcerated"—lend themselves to transposition by laymen who only hear them in passing and are asked to recall them after the fact. It may well be that the "contradictions" that led to Mastro's termination were the products not of mendacity but of faulty presuppositions and interpretations, which Duarte could have straightened out by questioning each person involved in the same manner.

account of the incident, Bryant testified that while he shouted and cursed at Mastro, he did not physically confront him. Yet the episode was apparently serious enough that Loman Dudley, a fellow employee and union representative, heard about it despite being absent from work at the time. Bryant also claimed that Mastro had instructed him on the morning of Tuesday, February 19th, to mark Harsley down for vacation because Harsley was in jail; the time sheets from that week, which Bryant kept, show Harsley's approved vacation. Bryant maintained that he was so surprised by Mastro's instruction that he immediately called Dudley, the union representative, to make sure he would not get in trouble for giving Harsley vacation when he was in jail. But Dudley's testimony flatly contradicts this assertion. Dudley contends he was home recovering from surgery and never heard from Bryant until "way after" the incident. A jury might find it curious that neither Duarte nor Pepco management bothered to assess the credibility of the individual whose account proved most central to determining Mastro's fate.

Another puzzling shortcoming of Duarte's investigation is his admitted failure to ask any of the individuals he interviewed whether they were friends with Harsley or if they had talked to each other about the incident prior to speaking with him, even though Duarte himself acknowledged that the members of Mastro's team were "a pretty close-knit group." Yet Duarte not only neglected to determine if collusion or camaraderie may have shaped the stories upon which he based his findings, he testified that such considerations were not an "integral part" of his investigation. Additionally, Duarte's decisionmaking process lacked the appreciable reflection one would expect for resolving such a serious matter. As he described it: "I just interview people, see what they say, and in the back of my mind determine whether I believe what they are saying or not believe what they are saying." In short, in conducting an

investigation that rested entirely on the question of credibility, Duarte eschewed consideration of any indicia of credibility. Viewed generously, Duarte seems to have based his determination on the sheer weight of numbers; but sufficient evidence exists for a jury to conclude, alternatively, that discriminatory treatment may have permeated the investigation itself.

Aside from the troubling flaws in Duarte's fact-gathering investigation, Pepco management inexplicably turned a blind eye to the issue of motive. Harsley had every reason to obscure his whereabouts when requesting vacation, for, as Duarte testified, Harsley was on notice that incarceration could have serious consequences for a probationary employee.[9] Pancholi also testified that Harsley would have been fired had he informed Mastro that he was unable to come to work due to incarceration. Mastro, on the contrary, had no motive to be untruthful regarding his knowledge of Harsley's whereabouts. The rules about the handling of such a situation seemed unclear and quite informal. Even after Mastro told Pancholi that Harsley was incarcerated, he was advised to approve the vacation and sort it out later. Pancholi himself admitted that he could not "make any sense" of Mastro's purported lack of candor. Nevertheless, Pancholi steadfastly refused to account for this factor, instead solely relying on the results of Duarte's one-sided investigation.[10]

Appellees believe that the mere fact that they conducted an investigation and fired Mastro as a result

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[9] Following an earlier incident involving Harsiey and an ex-girlfriend, Duarte had informed Harsley that incarceration could lead to discipline "up to and including" termination.

[10] According to Pancholi, he "had no need to jump in and start reasoning this motive versus that motive. Motive would have been one thing, but the outcome of the investigation was another.

should insulate their actions from further scrutiny. But we believe Mastro has presented sufficient evidence to "attack the employer's proffered explanation for its actions," *Holcomb*, 433 F.3d at 897. Mastro's claims call into question whether Appellees' investigation was a reasonably objective assessment of the circumstances or, instead, an inquiry colored by racial discrimination. Unlike our decision in *Fischbach v. District of Columbia Department of Corrections*, 86 F.3d 1180 (D.C. Cir. 1996), where we found there was "nothing the least bit fishy" about the procedure an employer used in subjecting the plaintiff to an adverse employment action, *id.* at 1184, we cannot say the same here. *Cf. Salazar*, 401 F.3d at 509 (denying summary judgment where "a jury could conclude that [an employer] failed to provide a 'fairly administered selection process' and that its claim to the contrary is pretextual"). Whether, for example, Bryant's statements, so critical to the decision to terminate Mastro, are worthy of credibility, and whether the investigation Duarte carried out was fair and impartial are genuine issues of material fact properly assigned to the jury. "Although a jury may ultimately decide to credit the version of the events described by [the employer] over that offered by [the employee], this is not a basis upon which a court may rest in granting a motion for summary judgment." *George*, 407 F.3d at 413. Accordingly, we reverse the district court's order of summary judgment with respect to Mastro's discrimination claim.

B

We turn next to Mastro's defamation claims. Mastro alleges Appellees defamed him when they published the termination memoranda outlining the reasons for his discharge. He argues Appellees acted with malice in publishing the documents because the statements they contained were the products of discrimination. In addition, Mastro claims that Appellees excessively published the

memoranda; he maintains that more than twenty Pepco employees were aware of his termination and the circumstances behind it and contends one of the managers privy to the personnel action must have widely communicated the information. Because of the accusations of lying that led to his termination, Mastro asserts, he has been unable to secure another engineering job. The district court concluded Mastro's defamation claims are meritless because he failed to produce any evidence defeating Appellees' privilege to publish the termination memoranda. We agree.

"When deciding state-law claims under diversity or supplemental jurisdiction, federal courts apply the choice-of-law rules of the jurisdiction in which they sit." *Ideal Elec. Sec. Co. v. Intl Fidelity Ins. Co.*, 129 F.3d 143, 148 (D.C. Cir. 1997); *see also Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). Because federal jurisdiction over Mastro's defamation claims is grounded in supplemental jurisdiction, *see* 28 U.S.C. § 1367, we "look[] to the choice of law rules prevailing in the District of Columbia," which "employs the governmental interest analysis test of the Restatement Second of Conflict of Laws." *Weyrich v. New Republic, Inc.*, 235 F.3d 617, 626 (D.C. Cir. 2001) (citing *Vaughan v. Nationwide Mut. Ins. Co.*, 702 A.2d 198, 200 (D.C. 1997)) (italics omitted). "Applying it to defamation actions, 'the weight of authority considers that the law to be applied is that of the place where the plaintiff suffered injury by reason of his loss of reputation.'" *Id.* (quoting *Dowd v. Calabrese*, 589 F. Supp. 1206, 1210 (D.D.C. 1984)) (brackets and ellipsis omitted). Mastro is a resident of Maryland; however, if he suffered reputational injury, it was in the District of Columbia, where Pepco employed him and where, as Mastro contends, news of his firing "spread like wildfire" among his colleagues. Accordingly, we examine his defamation claim under District of Columbia law.

To make out a successful defamation action under District of Columbia law, a plaintiff must show

> (1) that the defendant made a false and defamatory statement concerning the plaintiff; (2) that the defendant published the statement without privilege to a third party; (3) that the defendant's fault in publishing the statement amounted to at least negligence; and (4) either that the statement was actionable as a matter of law irrespective of special harm or that its publication caused the plaintiff special harm.

Beeton v. District of Columbia, 779 A.2d 918, 923 (D.C. 2001) (citations omitted). Like the district court, we conclude Appellees are entitled to summary judgment because Mastro has not satisfied the second prong of this test. He has not adduced any evidence raising a genuine issue that Appellees acted outside the scope of applicable privileges—here, the common interest privilege—in publishing the termination memoranda.

The common interest privilege protects otherwise defamatory statements made "(1) . . . in good faith, (2) on a subject in which the party communicating has an interest, or in reference to which he has, or honestly believes he has, a duty to a person having a corresponding interest or duty, (3) to a person who has such a corresponding interest." *Moss v. Stockard,* 580 A.2d 1011, 1024 (D.C. 1990). Two circumstances foreclose asserting the privilege: first, excessive publication, defined as "publication to those with no common interest in the information communicated, or publication not reasonably calculated to protect or further the interest," *id.;* and, second, publication with malice, which, within the context of the common interest privilege, is "the equivalent of bad faith," *id.* at 1025. While the defendant bears the burden of proving the elements of the common

interest privilege, the burden of defeating the privilege by showing excessive publication or publication with malice lies with the plaintiff. *See Alade* v. *Borg-Wamer Protective Servs. Corp.*, 28 F. Supp. 2d 655, 657 (D.D.C. 1998); *Moss*, 580 A.2d at 1024; *cf. Smith* v. *District of Columbia*, 399 A.2d 213, 221 (D.C. 1979).

The record clearly demonstrates that Appellees' publication of the termination memoranda was protected by the common interest privilege and was neither excessive nor imbued with malice. Uncontradicted evidence shows the memoranda were only shared with Mastro, certain members of Pepco's management, Pepco's Employee Relations Department, two clerical assistants for filing purposes, and the District of Columbia Department of Employment Services. These individuals and entities possess a legitimate interest in knowing about the nature and outcome of personnel actions at Pepco, and, therefore, their receipt of the memoranda falls within the purview of the common interest privilege. Mastro does not generally dispute this finding; he claims, however, that over two dozen Pepco employees told him, upon his own informal questioning, that they had heard about his termination and the reasons behind it. According to Mastro, "simple deduction" leads to the conclusion the information contained in the termination memoranda was somehow impermissibly communicated to these individuals. But Mastro provides no evidence to support either this assertion or the broader argument that Pepco published the memoranda to anyone beyond those persons authorized to view them under company policy. Despite suggesting that up to twenty-six individuals received the information because of excessive publication, he fails to offer testimony or affidavits from any of them swearing to the source of their knowledge.

In further support of his excessive publication argument, Mastro claims Pancholi published information about his termination to William Sigafoose, a Pepco

employee who was neither Mastro's supervisor nor involved in the disciplinary proceedings against him. But uncontradicted evidence indicates otherwise: Sigafoose testified he only heard about Mastro's discharge through word of mouth and without any accompanying explanation of the reasons behind it. Furthermore, Sigafoose, a manager in Mastro's division on the level of Pancholi, was the first individual Mastro claims to have approached when he learned of Harsley's incarceration, since Pancholi, whom Mastro would have otherwise notified, was occupied in meetings. As a result, even assuming Sigafoose received the termination memoranda, he had a legitimate interest in the information. Thus, Mastro's excessive publication argument does not defeat Appellees' assertion of the common interest privilege.

Mastro's argument that Appellees lost the common interest privilege by publishing the termination memoranda with malice is also unavailing. District of Columbia law sets a high standard for establishing malice sufficient to defeat the protections of the common interest privilege. Malice is defined as "the doing of an act without just cause or excuse, with such a conscious indifference or reckless disregard as to its results or effects upon the rights or feelings of others as to constitute ill will." *Moss,* 580 A.2d at 1025 (quoting *Mosrie v. Trussell,* 467 A.2d 475, 477-78 (D.C. 1983)). But even a showing of ill will does not "forfeit the privilege so long as *the primary* purpose is to further the interest which is entitled to protection." *Columbia First Bank v. Ferguson,* 665 A.2d 650, 656 (D.C. 1995) (quoting *Mosrie,* 467 A.2d at 477-78) (internal quotation marks omitted). That is the case here. The primary purpose behind management's publication of the memoranda was not to sully Mastro's reputation, but to document the events leading to Mastro's dismissal, in conformance with company policy and applicable law. Whatever impermissible motives may have prompted Pepco management to terminate Mastro, Mastro has presented no

evidence suggesting that the communication of that decision to a small group of appropriate individuals was driven by anything more than the mundane need for businesses and governments to keep track of personnel actions. Mastro has accordingly failed to satisfy the difficult burden of showing malice. *See Novecon Ltd.* v. *Bulgarian-American Enter. Fund,* 190 F.3d 556, 567 (D.C. Cir. 1999) ("[I]f the language of the communication and the circumstances attending its publication . . . are as consistent with the nonexistence of malice as with its existence, there is no issue for the jury. . . ." (quoting *Mosrie,* 467 A.2d at 478 (quoting *Nat'l Disabled Soldiers' League, Inc. v. Haan,* 4 F.2d 436, 441-42 (D.C. Cir. 1925)))).

Mastro has raised no triable issues of fact as to Appellees' loss of the common interest privilege. Because neither excessive publication nor publication with malice exists to defeat the privilege in this case, Mastro has failed to demonstrate a necessary element of defamation, We therefore affirm the order of summary judgment for Appellees with respect to Mastro's defamation claims.

III

The district court properly granted summary judgment on Mastro's defamation claims, but erred in granting summary judgment on his discrimination claim. Accordingly, the judgment of the district court is affirmed in part and reversed in part, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

APPENDIX B

DECISION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIAN A. MASTRO,	)	
	)	
Plaintiff,	)	
v.	)	**Civil Action**
	)	**No. 03-1865**
	)	**(RMC)**
PEPCO, *et al.*,	)	
	)	
Defendants.	)	
	)	

[ENTERED: February 5, 2005]

MEMORANDUM OPINION

Brian A. Mastro, a Caucasian, worked at the Potomac Electric Power Company ("Pepco") from October 2, 1989 to May 20, 2002, when he was discharged for a "major incident of lack of candor" and a "major incident of unsatisfactory job performance." Mr. Mastro sues Pepco, arguing that Pepco's pre-discharge investigation was flawed and its termination decision the result of reverse race discrimination. He also sues for defamation based on the alleged improper publication of information regarding his termination.

Mr. Mastro offers only argument, not evidence, that Pepco's decision to terminate his employment was tainted by discriminatory animus. Similarly, he offers no evidence to support his argument that any of the defendants improperly published information regarding his termination. The Court will grant the motion for summary judgment filed by Pepco and the individually-named defendants and dismiss the complaint.

BACKGROUND

After more than twelve years of employment, Mr. Mastro was terminated by Pepco on May 20, 2002. Pepco dismissed him because Mr. Mastro's supervisors concluded that he had not told the truth about a subordinate's absence from work.

Mr. Mastro holds bachelor's degrees in psychology and electrical engineering, and a master's degree in engineering. Second Amend. Compl. ¶. From 1989 to 1996, he worked as a system engineer for Pepco. In 1996, Mr. Mastro was promoted to Distribution Project Engineer in the Underground Lines Section. *Id.* ¶ 10. In 2001, he became Distribution Project Engineer for Underground High Voltage, a position he held immediately prior to his termination. *Id.*

During his tenure, Mr. Mastro supervised work crews and managed numerous large construction and electrical projects. *Id.* at 11. Mr. Mastro received favorable employment reviews and his supervisors had no previous reason to doubt his honesty or integrity. Sigafoose Dep. at 8; Pancholi Dep. at 24-25.

On Sunday, February 17, 2002, one of Mr. Mastro's subordinates, Donald Harsley, was arrested after threatening to burn down arestaurant. Harsley Dep. at 27-30, 52, 56. Mr. Harsley is an African-American who, at the time, was a probationary employee and had worked for the company for less than a year. Because he was jailed after his arrest, Mr. Harsley was absent from work during the subsequent week. Pancholi Dep. at 70-72.

The exact timing of when Mr. Harsley informed Mr. Mastro of the reason for his absence is a disputed fact that was central to Pepco's decision to terminate Mr. Mastro. Mr.

Harsley insists that he left a message with Mr. Mastro on Monday, February 18, informing him that he needed two days of vacation because he was in jail. He also states that he spoke with Mr. Mastro on the evenings of Tuesday, February 19, and Wednesday, February 20, and told him that he was still in jail and needed more vacation time. Harsley Dep. at 27-28, 47-50. Mr. Mastro agrees that he spoke with Mr. Harsley on Tuesday, Mastro Dep. at 34-35, but argues that he did not know that Mr. Harsley was in jail until Wednesday evening or Thursday. Instead, Mr. Mastro claims that "[b]ased on rumors that Mr. Harsley was in jail," he consulted with a Pepco official about company policy in such situations, *id.* at 29-30, and informed Mr. Sunil Pancholi, his direct supervisor, on Thursday morning that Mr. Harsley was in jail. *Id.* at 35-36. Mr. Pancholi reported what he had learned to a Pepco compliance investigator, David Duarte. Pancholi Dep. at 69-70; Duarte Dep. at 11.[1] Mr. Duarte is African-American and Mr. Pancholi is East Indian. Pltf.'s Opp. at 2.

Based on information obtained from Mr. Mastro, Pepco planned to fire Mr. Harsley for lying to his supervisor about the fact that he was in jail when he asked for vacation time off. Pancholi Dep. at 88, 90. During an April 11 meeting attended by management and union representatives, Mr. Harsley insisted that a message had been left with Mr. Mastro on Monday, February 18, informing him that Mr. Harsley was in jail. Harsley Dep. at 27-28, 47-50; Pancholi. James Bryant, the employee who actually recorded vacation schedules, was called into the meeting. Bryant Dep. at 6, 16, 20-21. Mr. Bryant is an African-American. Pltf.'s Opp. at 2. Mr. Bryant reported that Mr. Mastro instructed him to mark

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[1] Mr. Duarte is a Senior Investigation and Mediation Specialist in Pepco's Compliance and Regulatory Reporting Division. Second Amend. Compl. ¶ 5. He describes himself as a Labor Relations Specialist for one area of Pepco, including those employees under Mr. Pancholi. Duarte Dep. at 34.

Mr. Harsley as being on vacation on the morning of Tuesday, February 19, because Mr. Harsley was in jail. Bryant Dep. at 10-13,21-22. Mr. Bryant was able to recall the day this happened because he was off work the next day for his annual checkup. Bryant Dep. at 14-15. Pepco decided not to discharge Mr. Harsley but extended his probationary period for eighteen months. Pancholi Dep. at 91-92.

Thereafter, Messrs. Pancholi and Duarte questioned Mr. Mastro further about the events of that week. Mr. Mastro continued to maintain that he did not learn that Mr. Harsley was actually in jail until Thursday, February 21, and that Mr. Harsley had a pre-scheduled vacation day on Tuesday, February 19. Pancholi Dep. at 112-19; Duarte Dep. at 31-34. Mr. Mastro provided a written summary of the events as he recalled them. Pancholi Dep. at 124-22; *id.* Exh. D0238 (written submission from Mr. Mastro) ("Communication on Tuesday and Wednesday, did not state that Mr. Harsley was in Jail. He said he was arrested for domestic problems. Witnesses misheard my comments about arrest and assumed he was in jail or possibly knew this already from another source.").

After internal consultations, Pepco managers concluded that Mr. Mastro had not been candid. On May 10, 2002, Mr. Pancholi issued a memorandum to Mr. Mastro:

> stating that Plaintiff knew of a Pepco probationary employee's incarceration on February 19, 2002, and the employee's request for vacation that day. The memorandum further stated that Plaintiff approved daily vacation requests from February 19-22, 2002, knowing that the employee was incarcerated, and falsely advised management that he became aware of the employee's incarceration on February 21,

> 2002. The memorandum further stated that Plaintiff also advised management that the employee had been pre-approved for vacation for February 19, 2002. According to the memorandum, when Plaintiff was directed by management to provide written documentation of his involvement, he continued to deny that he knew of the employee's incarceration on February 19, 2002. The memorandum concluded that Plaintiffs actions "include serious/major incidents of lack of candor and a serious/major incident of unsatisfactory performance," that Plaintiff would be placed on crisis suspension, and that discharge appeared warranted.

Second Amend. Compl. ¶ 25; *see* Pancholi Dep. Exh. 7.[2]

A meeting to discuss Mr. Mastro's continued employment with Pepco was convened on May 14. Second Amend. Compl. ¶ 29.[3] Mr. Mastro was steadfast, asserting that Mr. Harsley had not informed him that Mr. Harsley was in jail until Thursday, February 21. Duarte Dep. at 76. The department calendar, where Mr. Mastro said he had written a pre-scheduled vacation day for Mr. Harsley for Tuesday, February 19, and various time sheets were reviewed. The calendar showed that Mr. Harsley was off for the week;

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[2] "[C]risis suspension means that this is an investigation being conducted and the employee involved would not be required to come to work and he will not be paid for that time either." Pancholi Dep. at 157.

[3] Attendees at this meeting included: Brian Mastro, the plaintiff; Sunil Pancholi, his first line supervisor; David Duarte, a Labor Relations Specialist from Compliance & Regulatory Reporting; and Stan Wisniewski, Mr. Pancholi's supervisor from Field Services. *See* Pancholi Dep. Exh. 8.

Rudy Bradshaw was off on February 19 and 20; and Mr. Bryant was off on February 20. However, Mr. Harsley's time sheet was coded for unscheduled vacation on February 19. Duarte Aff. at ¶ 6. At the end of the meeting, Messrs. Pancholi, Duarte, and Wisniewski agreed that Mr. Mastro should be terminated unless further investigation suggested that Mr. Mastro had indeed been telling the truth. Pancholi Dep. at 165-66.

Thereafter, Mr. Duarte re-interviewed Mr. Harsley on May 18. Mr. Harsley was also steadfast, asserting that he had informed Mr. Mastro that he was in jail on the evening of February 18. Mr. Duarte interviewed Jose Smith, a fellow employee and friend of Mr. Harsley. Mr. Smith reported that Mr. Mastro had asked Mr. Smith on February 19 if he knew how to contact Mr. Harsley's girlfriend because Mr. Mastro had received a message on his answering service from Mr. Harsley stating that he was in jail. Duarte Dep. at 12-13, 45-46. Further, Mr. Mastro reportedly told Mr. Smith that he had put Mr. Harsley on vacation. *Id.*[4] Mr. Pancholi spoke with an employee, Dexter Herbert, who stated that Mr. Mastro had asked him for the phone number of Mr. Harsley's girlfriend on Tuesday, February 19, and that Mr. Mastro had indicated that he wanted to find out more about Mr. Harsley's arrest. Pancholi Dep. at 159; Pancholi Aff. ¶ 11. Both Mr. Pancholi and Mr. Duarte confirmed with Mr. Bryant that Mr. Harsley had not had pre-scheduled vacation on February 19 and that he recalled a conversation with Mr. Mastro

[4] Mr. Duarte contacted Nelson Daniels, a leadman under Mr. Mastro, but Mr. Daniels had no useful information. Duarte Aff. at ¶ 7.

concerning Mr. Harsley's incarceration. Pancholi Dep. at 128, 163; Bryant Dep. at 24-25.[5]

As a result of this investigation, Pepco managers concluded that they believed Messrs. Harsley, Bryant, and Smith, not Mr. Mastro. Duarte Aff. ¶ 10. They concluded that Mr. Mastro had not told them the truth. Pancholi Dep. at 139-40, 142; Duarte Dep. at 48. Mr. Pancholi sent a letter to Mr. Mastro on May 20, 2002, informing him that:

> Our previous investigations and subsequent additional investigations/interviews confirm that your actions indeed constituted a serious/major lack of candor and serious/major incident of unsatisfactory performance.
>
> Based on the facts and consistent with Corporate policy, we have terminated your employment, effective this date.

Pancholi Dep. Exh. 8.

Mr. Mastro initiated this litigation in the Superior Court of the District of Columbia on May 9, 2003. His initial complaint contained three counts of defamation. Count three, based on communications from Pepco to the D.C. Department of Employment Services, was dismissed by the Superior Court on July 25, 2003. Counts one and two were based upon an alleged improper publication of the May 10,

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[5] Mr. Pancholi also contacted Michael Pepper, Supervisor of Distribution for whom Mr. Harsley had previously worked, to see if Mr. Harsley was a "troubled employee" as asserted by Mr. Mastro. Pancholi Dep. at 160; Pancholi Aff. ¶¶ 12, 14. Oliver Butler, General Supervisor of Distribution, confirmed that Mr. Harsley had no history of work problems. *Id.*

2002 memorandum from Mr. Pancholi to Mr. Mastro and the May 20, 2002 termination letter.

The initial complaint in this Court was filed on September 5, 2003, alleging reverse discrimination in violation of Title VII of the Civil Rights Act of 1964. The parties agreed to consolidate the two actions and, on February 18, 2004, this Court granted Mr. Mastro's consent motion to amend the complaint in Federal Court to add the claims from Superior Court.

LEGAL STANDARDS

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). This procedural device is not a disfavored legal shortcut; rather, it is a reasoned and careful way to resolve cases fairly and expeditiously. *Celotex Corp. v. Catrett, All* U.S. 317, 327 (1986). In determining whether a genuine issue of material fact exists, the Court must view all facts and reasonable inferences in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Tao v. Freeh*, 27 F.3d 635, 638 (D.C. Cir. 1994). To be "material" and "genuine," a factual dispute must be capable of affecting the substantive outcome of the case. *Anderson*, 477 U.S. at 247-48; *Laningham v. United States Navy*, 813 F.2d 1236, 1242-43 (D.C. Cir. 1987).

The moving party must show that the nonmoving party "fail[ed] to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322. A nonmoving party must establish more than "the existence of a scintilla of evidence" in

support of his position, *Anderson,* 477 U.S. at 255, and may not rely solely on allegations or conclusory statements. *Greene v. Dalton,* 164 F.3d 671, 675 (D.C. Cir. 1999).

REVERSE DISCRIMINATION

Mr. Mastro brings a claim of race discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000a ("Title VII"), and Section 102 of the Civil Rights Act of 1991, 42 U.S.C. § 1981a. Title VII is designed to eliminate employment discrimination by prohibiting dissimilar treatment of similarly-situated employees on the basis of race, color, religion, sex, or national origin. *McDonald v. SantaFe Trail Transp. Co.,* 427 U.S. 273,278-79 (1976). "This is true regardless of whether the discrimination is directed against majorities or minorities." *Trans World Airlines, Inc. v. Hardison,* 432 U.S. 63, 71-72 (1977).

In typical employment discrimination cases under Title VII ~ involving minority plaintiffs — courts generally apply the burden-shifting scheme set forth *in McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973). Under that framework, the plaintiff must first establish by a preponderance of the evidence a *prima facie,* case of discrimination.

> To establish a prima facie case of discriminatory discharge, plaintiff ordinarily must show that (1) she belongs to a protected class, (2) that she performed at or near the level legitimately expected by her employer, (3) that she was discharged, and (4) that she was replaced by a person outside the protected class or that similarly situated individuals outside the protected class were retained.

Waterhouse v. *District of Columbia,* 124 F. Supp. 2d 1, 5 (D.D.C. 2000) (citing *Kidane v. Northwest Airlines, Inc.,* 41 F. Supp. 2d 12, 17 (D.D.C. 1999)). If successful, the burden of production shifts to the employer to articulate a legitimate, nondiscriminatory reason for its conduct. "If the employer meets this burden, the presumption of intentional discrimination disappears, but the plaintiff can still prove disparate treatment by, for instance, offering evidence demonstrating that the employer's explanation is pretextual." *Raytheon Co. v. Hernandez,* 540 U.S. 44, 50 (2003); *see also St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 507-08 (1993).

Some adjustment to this "basic allocation of burdens and order of presentation of proof" is needed "in *the prima facie* case required of a white male." *Lanphear v. Prokop,* 703 F.2d 1311, 1314-15 (D.C. Cir. 1983). Although membership in a socially-disfavored group was a predicate assumption in *McDonnell Douglas,* the Supreme Court recognized that the framework of analysis must be flexible to the requirements of the particular case and the particular offense alleged. *McDonnell Douglas,* 411 U.S. at 802 n.13. In all cases, the plaintiffs initial burden is to prove by a preponderance of the evidence that the circumstances of a dismissal "give rise to an inference of discrimination." *Harding* v. *Gray,* 9 F.3d 150, 152 (D.C. Cir. 1993) (citing *Tex. Dept. of Cmty. Affairs v. Burdine,* 450 U.S. 248, 253 (1981)). Where the plaintiff is a white man, no such inference arises automatically through satisfaction of the typical *prima facie* case. Therefore, to establish a *prima facie* case, a white plaintiff must "show additional 'background circumstances [that] support the suspicion that the defendant is that unusual employer who discriminates against the majority.'" *Id.* at 153 (quoting *Parker v. Baltimore & Ohio R.R.,* 652 F.2d 1012, 1017 (D.C. Cir. 1981)). This showing of background circumstances "substitutes for the minority plaintiffs burden to show that he is a member of a racial

minority...." *Id.* (citing *Bishopp v. District of Columbia,* 788 F.2d 781, 786 (D.C. Cir. 1986)).

Defendants appear to concede that Mr. Mastro can establish the first and third elements of his *prima facie* case because "he is a member of a protected class and was terminated" Defs.' Mem. at 5. They argue nonetheless that summary judgment must be granted in Defendants' favor because Mr. Mastro cannot establish the second and fourth elements of his *prima facie* case. *Id.* Specifically, Defendants argue that Mr. Mastro cannot establish that he was performing at or near Pepco's legitimate expectations because he lied about his knowledge about Mr. Harsley's incarceration. In addition, Defendants propose that Mr. Mastro has not presented evidence that he was replaced by a person outside his protected class, that similarly-situated individuals outside his protected class were retained, or that there are other circumstances that give rise to an inference of discrimination. *Id.* The Court agrees that Mr. Mastro cannot establish *aprima facie* case of discrimination.[6]

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[6] The Court disagrees with Defendants that Mr. Mastro was not performing up to expectations. Mr. Mastro claims that he had an "unblemished record of sterling performance, including near perfect attendance." Pltf.'s Opp. at 13. Although Defendants argue that this statement is inaccurate, they present little contradictory argument or evidence. Instead, they state that "[w]hat is relevant is Pepco's perception of Plaintiff s job performance at the time of Plaintiffs discharge, not his historical performance." Defs.' Reply at 3. Defendants assert that Mr. Mastro was not meeting Pepco's expectations because at the time he was terminated Pepco believed that Mr. Mastro had lied to his supervisor and that this showed a serious lack of candor and constituted an incident of unsatisfactory performance. *Id.*

Defendants' reliance upon Pepco's belief as to Mr. Mastro's candor cannot be the lynchpin for arguing that his performance was unsound because it is the very event that Mr. Mastro claims, is tainted by discrimination. In the absence of record evidence to the contrary, Mr. Mastro's contention that he was meeting Pepco's employment

As an initial matter, the Court perceives that the Defendants have treated the principle of *Harding* that a non-minority plaintiff must show an inference of discrimination against non-minorities as part of the fourth prong of the *prima facie* case, rather than as a substitute for the minority plaintiffs burden to show that he is part of a racial minority the first prong *of the prima facie* case. *See* Defs.' Mem. at 5-6 ("With respect to the fourth element . . . Plaintiff has not presented any additional background circumstances . . . ."). But for Defendants' concession as to the first prong, this rhetorical structuring would be of no consequence. Because the Court is not bound by this concession, it will examine whether Plaintiff has satisfied its burden under the first prong.

The D.C. Circuit in *Harding* provided a general overview of the type of evidence that could constitute "background circumstances." *Harding, 9* F.3d at 151. A satisfactory showing could include evidence that a "particular employer at issue has some reason or inclination to discriminate invidiously against whites ... or evidence indicating that there is something 'fishy' about the facts of the case at hand that raises an inference of discrimination." *Id.* at 153 (also holding that evidence that there is something "fishy" may "create *aprima facie* case by itself."); *see Waterhouse,* 124 F. Supp. 2d at 5 n.5 (summarizing the *Harding* approach to reverse-discrimination cases).

Mr. Mastro claims in summary fashion that he has a "gut feeling" that his termination was prompted by discriminatory animus, but provides no evidence of this fact. Mastro Dep. at 232-35, 242-43, 249-50. This lack of factual

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expectations must be credited. Pltf.'s Opp. at 13 (citing to Pancholi Dep. at 14-21). *See Laboy* v. O'Neill, 180 F. Supp. 2d 18, 23 (D.D.C. 2001) (citing *Greene* v. *Dalton,* 164 F.3d 671, 674 (D.C. Cir. 1999)) (nonmoving party may not rely solely on allegations or conclusory statements but must come forward with specific facts).

underpinning is illustrated by the following excerpt from his deposition.

> Q. Mr. Pancholi and Mr. Duarte, having conducted an investigation, believed the people who told them that you knew about the Harsley incarceration as opposed to you, who said that you didn't, isn't that correct.
>
> A., Oh, I'd say that's correct.
>
> Q. Was there any reason that they chose to believe those five people over you?
>
> A. I don't know what the reasoning was.

Mastro Dep. at 65.

Mr. Mastro asserts, "Defendants are a troubled company" citing a class action settlement reached in 1993 for alleged race discrimination against African-American employees. Pltf.'s Opp. at 1 n.l. He notes further that two of his supervisors "who acted against [him] because of his race" did so to benefit "two of its African American employees, Donald Harsley and James Bryant." *Id.* He points out that Mr. Duarte is African-American and that Mr. Pancholi is East Indian. *Id.* at 2.

Such facts and unsupported allegations do not establish background circumstances that raise even a colorable suspicion that the employer is acting to discriminate against the majority. *Anderson,* 477 U.S. at 249-50 (if evidence is merely "colorable or not significantly probative, summary judgment may be granted"). Rather, Mr. Mastro's proffer admits only a finding that he was dismissed in a perfunctory manner for what appears to be an isolated incident of apparent misconduct. His termination under such circumstances may indeed be baffling. As Mr. Mastro notes,

Defendants "can assign no plausible motive for Mr. Mastro to lie about knowing that one of his subordinates - with whom he had worked only a short time - was in jail." *Id.* at 3. But to infer discrimination because "PEPCO's non-white supervisors decided to take the word of a short-term African American employee, Mr. Harsley, who had been absent for four days because he was in jail rather than the word of Brian Mastro, a long-time, respected, high performing white manager," *id.* at 5, requires a leap of logic that is not supported by anything more than bare allegations.

Mr. Mastro's *prima facie* case fails for yet another reason: he has not produced evidence that he was replaced by someone outside of his protected class or that similarly-situated persons outside of his class were retained. He argues that he was initially replaced by an African-American. While true, this replacement was not permanent. Defs.' Mem. at 5. Furthermore, the position has been offered on a temporary basis to persons both white and non-white. No inference of discrimination can be drawn from these facts.

In addition, Mr. Mastro is unable to show that similarly-situated persons outside of his class were retained under the same types of circumstances that led to Mr. Mastro's termination. Mr. Mastro provides hearsay statements that other white supervisors were disciplined more harshly than African-Americans for similar kinds of infractions, all of which are contradicted by sworn testimony of Pepco witnesses. *See* Pltf.'s Opp. at 4. Mr. Mastro claims that a Caucasian employee was terminated for using a racial epithet, but that an African-American employee was not terminated for using the same epithet. *Id.* But there were other factors that contributed to the Caucasian employee's departure, a fact Mr. Mastro acknowledges. Mastro Dep. at 253-54. He argues that a Caucasian lead man was disciplined for refusing to work in the field while an African-American employee received a lesser sanction. Again, the disparate

treatment between these two employees is attributable to factual differences and the severity of the misconduct by these employees.

To establish disparate treatment, a plaintiff must show that other persons who "are similarly-situated in all respects," were treated differently. *Phillips v. Holladay Property Servs., Inc.*, 937 F. Supp. 32, 37 (D.D.C. 1996) (quoting *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 583 (6th Cir. 1992)). Mr. Mastro cannot point to any person who engaged in the same type of conduct that led to his termination but was treated differently. Consequently, he has failed to satisfy the fourth prong of his *prima facie* case.

Because "bare allegations of discrimination are insufficient to defeat a properly-supported motion for summary judgment," Mr. Mastro has failed to make a probative showing that an inference of discrimination is warranted on these facts. *Burke* v. *Gould,* 286 F.3d 513, 520 (D.C. Cir. 2002).

DEFAMATION

Mr. Mastro alleges that he was defamed. A statement is defamatory if it tends to injure plaintiff in his trade, profession, or community standing, or lower him in the estimation of the community. *Moldea* v. *New York Times,* 15 F.3d 1137, 1142 (D.C. Cir. 1994). To prove a claim of defamation, a plaintiff must show:

> "(1) that the defendant made a false and defamatory statement concerning the plaintiff; (2) that the defendant published the statement without privilege to a third party; (3) that the defendant's fault in publishing the statement amounted to at least negligence; and (4) either that the statement was actionable as a matter

> of law irrespective of special harm or that its publication caused the plaintiff special harm."

Crowley v. *North Am. Telecomm. Ass*'n., 691 A.2d 1169, 1173 n.2 (D.C. 1997) (quoting *Prins* v. *Int'l Tel. and Tel. Corp.*, 757 F. Supp. 87, 90 (D.D.C. 1991)).

A common-interest privilege exists to publish an otherwise defamatory statement where the statement was "(1) made in good faith, (2) on a subject in which the party communicating has an interest, or in reference to which he has, or honestly believes he has, a duty to a person having a corresponding interest or duty, (3) to a person who has such a corresponding interest." *Moss* v. *Stockard*, 580 A.2d 1011, 1024 (D.C. 1990) (citing *Ingber* v. *Ross*, 479 A.2d 1256, 1264 n.8 (D.C. 1984); *Smith* v. *District of Columbia*, 399 A.2d 213, 220 (D.C. 1979)). Excessive publication, or publication to those with no common interest in the information communicated, will render the statement non-privileged. *See, e.g., Joftes* v. *Kaufman*, 324 F. Supp. 660, 664 (D.D.C. 1971) (privilege "do[es] not exist where the employer publishes . . . the grounds for dismissal to persons without a legitimate job-related interest in receiving it").

Because Mr. Mastro has not produced any evidence that Defendants published the statement without privilege to a third party, his defamation claims must fail. Mr. Mastro argues that information regarding his termination, including the May 10, 2002 memorandum regarding his continued employment and the May 20, 2002 letter regarding his termination, was published improperly. But he has produced no evidence that anyone published such information to anyone other than plaintiff, plaintiffs management, Pepco's Employee Relations Department, and two administrative clerks. Mr. Mastro can only state that the circumstances of his termination "became . . . widely known at Pepco," Pltf.'s Opp. at 25, and list a number of persons who were aware that

"he had been terminated because he had allegedly lied about an employee's [sic] being in jail." *Id.* at 26. He has not produced any evidence that these individuals received this information improperly.

Because the reason for his firing "spread like wildfire," Mr. Mastro asks this Court to infer improper publication. Pltf.'s Opp. at 28. Such unsupported inference is insufficient to defeat Defendants' properly-supported summary judgment motion. Summary judgment will be entered against Mr. Mastro on his defamation claims.

CONCLUSION

For the reasons stated, Defendants' motion for summary judgment is granted. This case will be dismissed. A separate Order accompanies this memorandum opinion.

DATE: February 25, 2005.

/s/
ROSEMARY M. COLLYER
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIAN A. MASTRO,	)	
	)	
Plaintiff,	)	
v.	)	**Civil Action**
	)	**No. 03-1865**
	)	**(RMC)**
PEPCO, *et al.*,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM OPINION

For the reasons stated in the memorandum opinion, separately and contemporaneously issued, Defendants' motion for summary judgment is **GRANTED.** This case is **DISMISSED.**

SO ORDERED.

DATE: February 25, 2005.

/s/
ROSEMARY M. COLLYER
United States District Judge

APPENDIX C

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DENYING PETITIONER'S PETITION FOR REHEARING OR REHEARING EN BANC

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Entered July 11, 2006]

No. 05-7044 **September Term, 2005**
03cv01865

Brian A. Mastro,
Appellant

v.

Potomac Electric Power Company, PEPCO, et al.,
Appellees

BEFORE: Ginsburg, Chief Judge, and Sentelle, Henderson, Randolph, Rogers, Tatel, Garland, Brown, Griffith and Kavanaugh, Circuit Judges

ORDER

Upon consideration of appellees' petition for rehearing en bane, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Michael C. McGrail Deputy Clerk.

Supreme Court, U.S.
FILED
DEC 13 2006
OFFICE OF THE CLERK

(2)

No. 06-497

IN THE

Supreme Court of the United States

POTOMAC ELECTRIC POWER COMPANY, *ET AL.*,

Petitioners,

v.

BRIAN A. MASTRO,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the D.C. Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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INTRODUCTION

The issue decided by the D.C. Circuit in this case is a classic example of the type of fact-bound question that this Court does not exercise its certiorari jurisdiction to review: The court held that respondent Brian Mastro had presented enough evidence in support of his Title VII claim of reverse racial discrimination against petitioner Pepco to survive summary judgment. The court's over 20 pages of discussion of Mastro's Title VII claim exhaustively reviewed the evidence, described the legal principles developed by the D.C. Circuit in applying Title VII's prima facie case analysis to reverse discrimination claims on summary judgment, and concluded that Mastro had presented sufficient evidence to attack Pepco's proffered explanation for firing him and create a genuine issue of material fact as to whether he had been discriminated against because he is white.

Pepco's Petition for Certiorari does not purport to identify any flaw in the D.C. Circuit's discussion of any of the issues it actually addressed in its opinion, all of which concerned the application of Title VII to the particular facts of this case. Instead, Pepco raises an issue that the D.C. Circuit did *not* decide: whether a single piece of evidence, which was discussed in two paragraphs of the court's opinion, was admissible under Federal Rules of Evidence 408 and 403. The evidence in question was an expired consent decree that had required Pepco to take affirmative steps benefiting African American employees. The D.C. Circuit stated that it ascribed "some significance" to the consent decree because "a reasonable jury could believe it might encourage Pepco management to treat minority employees in a preferential manner." Pet. App. 12A.

The court's opinion, however, did not address challenges to the admissibility of the consent decree, for the simple reason that Pepco did not object to the admissibility of the decree either in the trial court or in its brief in the D.C. Circuit. Pepco failed to object even though the decree was among the

evidence Mastro proffered in the district court in his opposition to Pepco's motion for summary judgment and was relied on in Mastro's opening brief in the D.C. Circuit. Only after the D.C. Circuit ruled against it did Pepco belatedly raise the evidentiary issue in its petition for rehearing, which the D.C. Circuit denied without comment.

Even if the issue had been properly raised and decided below, Pepco's Rule 408 argument is patently meritless because it is based on an obvious misreading of the plain language of the rule, which renders a settlement or settlement offer inadmissible only to prove the validity of *the claim that is the subject of the settlement or offer*. Of course, the consent decree here was not offered as proof that Pepco was liable on the claims that the consent decree settled (which were claims of discrimination against African American employees), so Rule 408 does not apply. Pepco's Rule 403 argument, which requests that this Court engage in the first instance in a fact-specific balancing of the probative value of the consent decree against its possible prejudicial impact, fails to identify any important question of federal law suitable for review by this Court.

Finally, Pepco wrongly contends that admitting the consent decree as evidence supporting Mastro's claims would conflict with the Sixth Circuit's 26-year-old decision in *EEOC v. McCall Printing Corp.*, 633 F.2d 1232 (6th Cir. 1980). *McCall*, however, had nothing to do with the admissibility of a consent decree as evidence of a motive to discriminate, but decided a different issue altogether: whether nonparties to a Title VII consent decree could challenge the *decree itself* as a violation of their own rights under Title VII. Even assuming that the Sixth Circuit's negative answer to that question survives subsequent decisions of this Court entertaining exactly such challenges, *McCall* has no bearing on this case, which does not involve a claim by Mastro that the expired consent decree itself violated his rights.

In sum, the issues decided by the D.C. Circuit in this case are no more than fact-specific applications of Title VII law that Pepco does not even claim were erroneous. The evidentiary issues Pepco asks this Court to address were not decided below because Pepco did not raise them, and they are in any event wholly meritless. This Court should deny certiorari.

STATEMENT OF THE CASE

Pepco largely confines its statement of the case to a description of the procedural history and avoids discussion of the facts, which are exhaustively described in the D.C. Circuit's opinion. Rather than rehearse those facts, we refer the Court to the opinion. We note, however, that Pepco's assertion that it fired Mastro "for failing to tell the truth about an African American subordinate's absence from work" (Pet. 4) cannot be accepted as an accurate statement of "fact" at this stage in the proceedings, where the facts must be construed in favor of Mastro as the opponent of Pepco's summary judgment motion. As explained at length in the D.C. Circuit's opinion, Mastro's evidence, if accepted, would establish that he did tell the truth, that Pepco's reliance on his alleged untruthfulness as the basis for his termination was a pretext for racial discrimination against him because he is white, and that African American employees would not have been terminated for similar claimed infractions. In short, the reasons for Mastro's termination have not been established as a matter of fact in this case. Rather, the court below determined that there is a genuine issue of fact over precisely that issue.

Pepco's statement of the case also omits a key procedural matter: the identification of when and how the issues it now presents were raised and decided in the courts below. That is no mere oversight, for, as explained further below, Pepco's current argument that the expired consent decree that the D.C. Circuit considered as part of the evidence supporting Mastro's claim is inadmissible was not raised by Pepco either in the trial court or the court of appeals, and was not decided by the D.C. Circuit.

REASONS FOR DENYING THE WRIT

I. The Evidentiary Issues Pepco Asks This Court to Decide Were Neither Raised Nor Decided Below.

The D.C. Circuit's opinion can be searched in vain for any holding on the evidentiary issues proffered by Pepco in its Petition for Certiorari. Nowhere did the Court address Federal Rules of Evidence 408 or 403, for the simple reason that the admissibility of the consent decree was not contested by Pepco either in the district court or in the D.C. Circuit. Mastro presented evidence of the consent decree in his opposition to Pepco's motion for summary judgment, and Pepco failed to argue that the evidence was not admissible; hence, the decree was, without objection, considered by the district court when it granted Pepco's motion for summary judgment. *See* Pet. App. 13B. Similarly, Mastro cited the consent decree in his brief on appeal in the D.C. Circuit, and Pepco's merits brief did not argue that the D.C. Circuit should ignore the decree because it was inadmissible. Pepco first argued that the decree was inadmissible in its rehearing petition, which the D.C. Circuit denied without comment.

It is firmly established that this Court ordinarily does "not decide in the first instance issues not decided below." *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 109 (2001) (per curiam) (internal quotation marks omitted). In addition, "[i]t has been the traditional practice of this Court ... to decline to review claims raised for the first time on rehearing in the court below," *Wills v. Texas*, 511 U.S. 1097 (1994) (O'Connor, J., concurring in denial of certiorari), except where the lower court actually decided the issue or the issue could not have been anticipated until after the lower court ruled, neither of which was the case here. Moreover, the general rule in the D.C. Circuit is that issues first raised in a petition for rehearing are waived, *see Keating v. FERC*, 927 F.2d 616, 625-26 (D.C. Cir. 1991), so there can be no suggestion that the D.C. Circuit somehow implicitly decided the issues Pepco presents to this Court simply because Pepco included

them in its rehearing petition. Because the issues Pepco now raises were neither raised nor decided below, this Court should not now entertain them.

II. The Federal Rules of Evidence Do Not Bar Admission of the Consent Decree Under the Circumstances of this Case.

Pepco places principal reliance on Federal Rule of Evidence 408 in arguing that the expired consent decree may not be admitted in evidence to support Mastro's claims. Rule 408 provides in pertinent part that: "Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise *a claim* which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of *the claim* or its amount." (Emphasis added.)

As the text of the rule makes clear, it is triggered only when there was a settlement or offer to settle a particular disputed claim, and the settlement or settlement offer is then offered as evidence of liability for (or invalidity of) *that claim*. Only under those circumstances does the rule bar admission of the evidence. Here, of course, the claim that was settled by the expired consent decree was a claim that Pepco had discriminated against a class of African American employees. Mastro is not offering the decree as evidence that Pepco was liable on *that claim*. Hence the rule by its terms does not apply.

One of the cases Pepco itself cites, *Pierce v. F.R. Tripler & Co.*, 955 F.2d 820 (2d Cir. 1992), illustrates the point. In that employment discrimination case, the defendant offered the plaintiff a new job in an effort to settle the discrimination clam that was at issue in the case, and the court held that because the settlement offer pertained to the claim at issue, the settlement offer could not be used as evidence with respect to the amount of *that claim*, based on the plain language of Rule

408. Pepco's Petition misleadingly states that *Pierce* illustrates "the improper use of a *previously entered settlement agreement* to prove an employer's liability for a *subsequent alleged discrimination*," Pet. 7 (emphasis added), but that description is completely off the mark. The settlement offer (not agreement) in *Pierce* came *after* the discrimination in the case and was offered as evidence with respect to liability for the very claim of discrimination that the defendant sought to settle, not, as here, a different claim.

None of the Rule 408 cases Pepco cites holds that a settlement offer or agreement is inadmissible as proof with respect to a claim other than the claim that was the subject of the settlement (or proposed settlement), for the simple reason that the clear language of Rule 408 does not extend to such evidentiary uses of settlement agreements. Indeed, the rule expressly provides that it "does not require exclusion when the evidence is offered for another purpose"—that is, a purpose other than proving "liability for or invalidity of *the claim*" that was the subject of the settlement or offer. Fed. R. Evid. 408 (emphasis added). Pepco's argument that the rule should be extended beyond its terms in light of the strong policy favoring settlement (Pet. 8-13) is unsupported by citation of any authority applying Rule 408 to preclude evidentiary uses of settlement agreements that fall outside the plain language of the rule.

Beyond its complete misreading of Rule 408, Pepco also asks this Court to consider whether the consent decree should have been excluded under Rule 403 on the ground that its probative value was outweighed by its prejudicial impact (another issue not considered or decided by the D.C. Circuit in this case). Ironically, the principal authority Pepco cites to support this argument is another decision of the D.C. Circuit, *Kolstad v. American Dental Ass'n*, 108 F.3d 1431 (D.C. Cir. 1997), *vacated and remanded on other grounds*, 527 U.S. 526 (1999). Pepco's citation of *Kolstad* establishes that the D.C. Circuit is fully aware of and sensitive to Rule 403 con-

cerns and properly applies the rule when the issue is presented to it (which Pepco failed to do here). *Kolstad* thus refutes any suggestion that the D.C. Circuit applies Rule 403 in a manner that conflicts with the law of other circuits. Beyond that, *Kolstad* illustrates that the application of Rule 403 turns on the impact of specific evidence in light of the particular facts and circumstances of individual cases, a fact-bound inquiry unsuited to review by this Court. In short, Pepco's citation of *Kolstad* demonstrates that the Rule 403 issue does not merit exercise of this Court's certiorari jurisdiction.

Aside from *Kolstad*, Pepco's citation of cases under Rule 403 is limited to a 15-year-old, nonprecedential Tenth Circuit decision and three district court decisions, two of which are unpublished. Suffice it to say that such citations do not establish a conflict among the courts of appeals with respect to an important question of federal law. Moreover, all the cases show is that the balance of factors under Rule 403 may sometimes lead to exclusion of evidence of a consent decree, depending on the facts of particular cases. Even if the D.C. Circuit had been presented with and decided a Rule 403 question in this case, a decision that Rule 403 does not bar admission of the consent decree on the particular facts of this case would not conflict with decisions balancing probative value and prejudicial effect in other circumstances.

III. Pepco's Claim That the Decision Below Conflicts with the Sixth Circuit's Decision in *EEOC v. McCall Printing Corp.* Is Specious.

In a final attempt to demonstrate that this case presents some kind of conflict among the circuits, Pepco dredges up the Sixth Circuit's 1980 decision in *EEOC v. McCall Printing Corp.*, 633 F.2d 1232. Even if there were some conflict between the decision below and *McCall*, it would be a stale and shallow circuit split at best. But the issue in *McCall* was so different from the issue Pepco raises in this case that any claim of a conflict is completely groundless.

Unlike this case, *McCall* did not involve the use of a consent decree as evidence of a defendant's discriminatory state of mind in a subsequent case involving disparate treatment of an individual employment. Rather, the issue in *McCall* was whether employees who were not parties to a court-approved consent decree could bring a Title VII action claiming that the consent decree itself violated their rights. The Sixth Circuit's holding was that "that conciliation agreements resulting in consent decrees may not be considered independent acts of discrimination, as a matter of law, unless there are allegations of bad faith in making the agreement, that is, allegations that the agreement was not a bona fide attempt to conciliate a claim but rather an attempt to bestow unequal employment benefits under the guise of remedying discrimination." 633 F.2d at 1238. Because this case, unlike *McCall*, involves no claim that the consent decree itself was an independent act of discrimination, the decision below cannot possibly be said to conflict with *McCall* in any way.

In any event, *McCall*'s holding is apparently at odds with this Court's subsequent recognition in both *Local No. 93 v. City of Cleveland*, 478 U.S. 501, 529 (1986), and *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984), that entry of a Title VII consent decree resolving the claims of one group of employees does not preclude other employees from challenging the decree as a violation of their own Title VII rights. Indeed, the Sixth Circuit itself, in *Vanguards of Cleveland v. City of Cleveland*, 753 F.2d 479 (6th Cir. 1985), recognized subsequent to *McCall* that nonconsenting employees could challenge a consent decree as a violation of their own rights, *see id.* at 484, a point on which the Supreme Court agreed when it affirmed *Vanguards* in *Local No. 93*. This Court need not, however, consider whether *McCall* survives *Local No. 93* and *Stotts*, because the issue is not presented in this case.

IV. The Decision Below Is Interlocutory.

As if there were not enough reasons to deny certiorari in this case, denial is also appropriate because the decision below is not final, but involves a remand for further proceedings, including a trial on the merits. This Court generally "await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Virginia Military Institute v. United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting the denial of certiorari) (citing *American Constr. Co. v. Jacksonville, T. & K.W.R. Co.*, 148 U.S. 372, 384 (1893); *Locomotive Firemen v. Bangor & Aroostook R. Co.*, 389 U.S. 327, 328 (1967) (per curiam); R. Stern, E. Gressman, & S. Shapiro, Supreme Court Practice § 4.18, pp. 224-226 (6th ed. 1986)).

Here, the interlocutory posture of the case strongly counsels against a grant of review now. Not only does it remain to be determined whether Mastro will ultimately prevail on his claims, it is also as yet unknown—and unknowable—what evidence will be admitted at trial (assuming that the case is not resolved without trial). There are any number of possible outcomes that could avoid altogether any need to consider the evidentiary issues Pepco raises, and there are no pressing reasons why this Court should depart from its ordinary policy of deferring review until the case has been finally decided.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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